

1	WARRANTY PROTECTION FOR HIGH-TECH	
2	PRODUCTS AND SERVICES	
3	AGENDA ITEM	PAGE NO.
4		
5	The Uniform Computer Information	
6	Transactions Act (cont.)	295
7		
8	Break	383
9		
10	The Government's Role	383
11		
12	Lunch	412
13		
14	On The International Front	413
15		
16	Intellectual Property Law Issues	
17	Associates with Software Transactions	456
18		
19	Break	520
20		
21	Looking to the Future: Technical	
22	Solutions to Consumer and Industry	
23	Concerns	520
24		
25	Concluding Thoughts	554

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL TRADE COMMISSION WORKSHOP

WARRANTY PROTECTION FOR HIGH-TECH SERVICES

MATTER NO. P994413

FRIDAY, OCTOBER 27, 2000
WASHINGTON, D.C.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 P R O C E E D I N G S

2 - - - - -

3 MS. HARRINGTON: Good morning. First of all,
4 there have been questions about the transcript and when
5 it will be available, and I understand that it will be
6 available very quickly, like within a couple of days,
7 maybe a week, and we will be putting the transcript up
8 on the FTC website in the area with the other
9 information about this project.

10 I thought for myself that yesterday was a very
11 helpful day-long learning exercise. As we said at the
12 outset yesterday, the FTC staff is holding this
13 symposium so that we have an opportunity to read in
14 advance of the symposium very thoughtful observations
15 and comments in response to the questions that we
16 published in the Federal Register notice, and I think
17 that the written body of submissions is extremely
18 helpful to us, as well as the presentations yesterday
19 and the sequence of those presentations which took us
20 through a discussion of the business models, I found
21 that to be very, very helpful, and I thank the
22 presenters from that panel particularly.

23 Very good discussions about issues around
24 licensing, the Magnuson-Moss Warranty Act, very good
25 background on that. Following that, again, a very good

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 discussion on whether consumers can make meaningful
2 agreements in shrinkwrap or clickwrap transactions, and
3 then late yesterday we got into UCITA with a very good
4 panel that I think gave some good background
5 information on the process and the evolution of what
6 has now emerged as UCITA.

7 So, that brings us this morning to a discussion
8 that I'm sure will be lively of UCITA itself and what
9 it means in the context of the concerns that we've
10 raised in the Federal Register notice and in comments
11 about consumer protection and how consumer protection
12 law fits with the UCITA model.

13 We have a very good panel representing
14 different interests and a variety of points of view.
15 We have two state law commissioners, members of the
16 drafting group who don't agree on some of the
17 fundamental issues. We have a law professor, a
18 thoughtful academic, who is I think a consistent critic
19 of the UCITA model from the perspective of consumer
20 protection law.

21 We have a very distinguished member of the
22 Maryland House of Delegates and sponsor of the
23 legislation in Maryland who has given a great deal of
24 consideration to this model and how it applies in the
25 marketplace, and as a Marylander myself, I welcome you

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 particularly. Oh, nice tie, yeah.

2 And we have an attorney from Sun Microsystems
3 who can speak from that company's perspective, and I
4 also in the interest of full disclosure should tell you
5 that Adam used to work here and was very interested in
6 these issues when he was a staff attorney at the FTC.

7 So, I think this will be an interesting and
8 lively panel, and I am going to kick it off. I would
9 ask that the panelists give us about 10 to 12 minutes
10 initially on issues that you would like to present or
11 discuss. I think that we have a good opportunity to
12 hear some good discussion among the panelists and some
13 reaction from panelists to what other presenters are
14 saying.

15 So, if you could watch the clock for me, try to
16 condense your initial remarks, you will have a lot of
17 opportunity in the discussion to supplement those
18 initial observations. We are just going to take this
19 in the order that the agenda lays out. So, our first
20 presenter this morning is Stephen Chow, who is an
21 attorney in Boston, and while he's getting to the
22 podium, I can tell you that he has just a million
23 degrees in all sorts of interesting things, not just
24 law, and lots of honors, too. So, thank you very much
25 for joining us, Stephen, and take it away.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 MR. CHOW: Good morning.
2 Thanks for asking me to participate on this
3 panel. I will have to admit that I am actually doing
4 some penance here, because I initiated the idea of the
5 UCC 2-B about 1989, and at that time it was quite
6 interesting because the reporter of UCITA, Ray Nimmer,
7 was looking around for a new project, and part of it
8 was to produce a uniform software licensing act. At
9 that time the hardware industry was essentially
10 controlling most of the software, and in essentially he
11 was going to places like the Computer and Business
12 Equipment Manufacturers Association, and they were
13 saying to him, get out of here, ain't broke, don't fix
14 it, this is a solution looking for a problem.
15 By 1992, things had changed. One was the
16 Stepsaver decision that said that basically software
17 wasn't good, period, and another thing that happened
18 was the mass market software business began to come
19 into being. Windows 3.1 started making major inroads
20 into people's personal lives in many ways, and the --
21 at that time, Ray got to be technology reporter on the
22 then new revised Article 2 project, and most of the
23 other things that occurred were mentioned by Mary Jo
24 Dively yesterday as well as Amy Boss.
25 I take this on somewhat as a crusade, because I

1 started off with the statute that was addressing the
2 licensing of intellectual property and wound up with
3 something that's a -- somewhat of a hybrid that I'll
4 talk about. I also want to actually express my
5 admiration to Commissioner Ring who has been just a
6 bulldog in getting this legislation through and, you
7 know, I'm sorry we have to be on opposite sides of this
8 whole business.

9 Let me take off from what people talked about
10 yesterday. Again, I say don't fix what ain't broke.
11 Licensing of intellectual property rights has existed
12 well with sales for many, many years, and we have had a
13 generation of treatment of off-the-shelf software
14 performance under Article 2, and during and over that
15 period of time, there has been major software growth.

16 I started working -- I programmed computers
17 back in the mid and late sixties, and I've certainly
18 been licensing computer technology since 1976, even
19 before the new Copyright Act, and I've known a lot of
20 the decisions that we've made about whether we were
21 sublicensing or whether we were jumping over into many
22 areas, and these issues have been discussed over a long
23 time, and it has not been a problem. There is no
24 market failure. There is not one case that's been
25 cited by anybody that says that this case is

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 detrimental to the industry.

2 The idea is that functional software, as
3 distinguished from other kinds of information, and I
4 think that I -- with Professor Reitz yesterday, we
5 talked about that. He wanted to treat pure information
6 but eventually said that if it was functional, it
7 really was part of the good, because software is -- has
8 tangible results. In the patent area, which I practice
9 in, there are decisions that say software has tangible,
10 concrete results, so that's certainly one view of it.

11 Under products liability law, the American Law
12 Institute in its restatement of products liability,
13 which was actually viewed as fairly pro-industry, said
14 that software was quite likely to be a product,
15 although it left that for further consideration. It
16 distinguished the idea that other kinds of information
17 would not be part of products liability.

18 My view of e-sign and ETA are appropriately
19 addressed to issues such as the clickwrap model, and I
20 think that among my small developer clients -- and I
21 tend to generally represent telecommunications and
22 computer equipment manufacturers and systems providers
23 as well as service providers, the ASP model as we've
24 talked about, but a lot of these folks are small
25 developers.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 I think that the idea is that some of them want
2 to be sure their contracts work, but I think the
3 position taken on each side annually, there was let's
4 wait until technology develops, let's not pin ourselves
5 to what's not important.

6 Let's talk about the network considerations. I
7 heard yesterday atoms are not bits. I agree with that,
8 but atoms are probabilistic, and bits are completely
9 deterministic. In other words, digital copies make
10 perfect goods. Perfect goods are those that if you use
11 them, they continue to be just as viable, as opposed to
12 being exhausted, as what are called physical atom-based
13 goods, but the kind of issues that the network affects
14 incompatibility, buggyness, stuff like that, these are
15 really many -- really our choices.

16 General Electric and Motorola have six sigma
17 manufacturing, and they don't have imperfect software.
18 The component -- the software component manufacturers,
19 they don't have buggy software. A lot of the desktop
20 models that are pushed to the marketplace, that has
21 been the issue.

22 The internet was developed by public standards,
23 not by proprietary interfaces. I spent the 1980s and
24 most of the 1990s representing Digital Equipment
25 Corporation and saw them go from proprietary buses to

1 nonproprietary buses and back, and frankly, the ones
2 that were open were the ones that tended to work best,
3 such as ethernet, which is part of the underlying part
4 of -- portion of the internet itself.

5 The maintenance and performance standards
6 advances the networked economy. In other words, if you
7 start being lax about performance standards, you wind
8 up having things that don't fit together, which is
9 exactly what happens when we talk about expectations
10 about very large computer programs with lots of bells
11 and whistles and that grow from half a meg one year to
12 two megs the next year and, you know, requires you get
13 a faster computer and another operating system, I
14 suppose.

15 The performance standards are important, and
16 they are provided on a -- I think an appropriate level
17 under UCC 2, that is, it's neutral as to hardware
18 standards or software standards, and in many ways even
19 the service model approaches this. As I draft
20 application service provider program -- provisions or
21 either on the licensor side or the licensee side, we
22 are providing levels of service and guaranteeing, you
23 know, that this will be available 99 percent of the
24 time or 99.9 or 999, and at some cost we can certainly
25 get to those levels of performance.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 The problem in a lot of what we're talking
2 about is taking information and putting it into some
3 other statute such as UCITA, whether it's UCITA or not,
4 is that UCC 2 poses the wrong questions for content.
5 So, in that sense UCITA burdens innovation, because
6 it's based on Article 2. You know, we talk about how
7 this is good for the internet economy.

8 The fact is that we started in 1996 on a UCC 2
9 model, the same questions, slightly different answers,
10 but still, we brought a lot of people who were never in
11 the Article 2 space into Article 2 or the Article 2
12 framework, and this is a problem for some of the people
13 I represent, universities, basic research institutions.
14 They -- you know, for -- and these people are included,
15 because if you -- if one of the major proponents of
16 this statute, the stock markets, to protect their stock
17 quotations, are included, stock quotations have a whole
18 lot of value even if they not in complete form, but the
19 empirical research side of things, if you're talking
20 about seismology or biotech, all of that has to be part
21 of -- has to be in computer form.

22 So, the application of the product-oriented
23 implied warranties for the things that we've been
24 talking about have never been applied to university
25 contracts, and what this does is it invites lawsuits

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 where they have never been there before. Maybe the
2 implied warranties are there. In fact, the reporter
3 Ray Nimmer says that yes, service contracts have
4 warranties, though they are a little bit different from
5 product warranties, but they are there to begin with,
6 but putting it in a statute certainly invites
7 litigation, and it changes the bargaining baseline.

8 Right now, if under a university license
9 someone comes and says to me, look, I want a warranty
10 that this does not infringe, and the university doesn't
11 have a clue. So, you have to go out and do the
12 research and charge extra for that sort of thing. Now
13 you've changed the baseline. You start at a different
14 point. It may not be a big burden, but it is a burden.

15 Creating direct privity between the producer
16 and the end user is a very interesting concept that is
17 done here. People have avoided this in the producer
18 community for a hundred years. We still avoid that in
19 Article 2 provision, but does this, in fact, open the
20 path back up to change on products liability? Does it
21 open it up against component manufacturers and others?
22 Does it open it up against the publishers themselves?

23 I mean, right now, the Illinois Brick defense
24 of indirect purchasers not having standing to sue has
25 been used as a defense in antitrust class actions.

1 Does this weaken that? Perhaps it does.

2 But UCITA balances the licensor and licensee
3 interests by favoring the publisher in both roles, and
4 that's one of the issues that I have. There are many
5 deals here that deal with -- the recent deal of the
6 MPAA talks about an idea submission. Now, in my
7 practice, we do a lot of nondisclosure agreements by
8 people who don't have any products, they have ideas,
9 they have data, they have other things, but again, the
10 New York State case that this principle came from
11 addressed the very simple ones, much like, gee, I have
12 a great idea to make you profitable, buy low, sell
13 high, but when you start putting this in a statute, you
14 look at, well, what is confidential, concrete, novel?
15 To me, these standards are perhaps higher than the
16 standards set for the licensor in the transactions that
17 UCITA looks at.

18 I'm going to speed through this, again, to try
19 to finish this up, but UCITA hurts small developers.
20 Electronic self-help has been justified on repo
21 grounds. See, well, if you secure many people, then
22 why can't we? But as you heard from Mr. Johnson,
23 automobiles are self-contained. They don't have
24 network effects. That's why it's very different.

25 In addition, the damage to the vendees and to

1 third parties, the UCITA compromise actually hurts
2 small developers in my view, because when it's
3 authorized and a state says you can do this, well, then
4 the standard is that it can be done, even if you have
5 to jump through some hoops, and the rational purchaser
6 will say, well, my protection is consequential damages.

7 Well, that means they should never hire someone
8 who can't answer the consequential damages or they must
9 post a bond. So, inherently this I think hurts the
10 economy of any state that adopts UCITA, certainly on
11 the small developer side.

12 I think a lot of this will be talked about by
13 some of the intellectual property property people who
14 follow me. The traditional intellectual property
15 license granted a license, but it talked about this in
16 terms of the intellectual property rights. In
17 copyrights it's the right to reproduce, the right to
18 distribute to the public, to displace publicly, to make
19 derivative works. People have been a little bit lazy
20 about this, and they put other kinds of use
21 restrictions on their contracts.

22 Traditionally, this meant that if you exceeded
23 the scope of the grant, you could go for an
24 infringement action, usually in federal court, you
25 would get a fair use defense. On the other hand, if

1 it's a breach of condition and it is not a -- doesn't
2 rise to the level of misuse, then that may lead to
3 cancellation of the license. It may be an infringement
4 action then, but certainly a contract action.

5 The UCITA license may be a simple naked
6 restraint. By clicking you agree not to use this for
7 something. This in a sense allows some recapture
8 perhaps of public domain information, and this
9 traditionally is viewed as against the intellectual
10 property policies certainly of the nation, where you
11 give something to the public that is complete
12 disclosure in return for some limited monopoly,
13 according to the Constitution.

14 The violation of restraint here may lead to a
15 contract action with consequential damages in state
16 court, and you are only subject to the defense of
17 unconscionability or violation of fundamental policy of
18 the UCITA state. Unconscionability has only been found
19 in 40 cases maybe a dozen times in 50 years, so
20 unconscionability is not that great effects compared to
21 the number of times you see fair use defenses
22 succeeding.

23 The mass market licenses I call IP ultra. IP
24 licenses typically are personal. They do not -- are
25 not transferable, because you are giving someone a

1 license saying, please develop my technology, and you
2 don't want to give that to competitors. You don't want
3 that to wind up in competitor hands. The difference
4 here is that when we're talking about transfers to more
5 than the personal market, and this happened in the past
6 where, as I said, sales and licensing have co-existed,
7 and we have had first sale rights, we have had
8 exhaustion, there are a number of doctrines that apply
9 to this.

10 Here we have a situation where the mass market
11 is totally anonymous. I think it may come through a
12 retail situation, someone may actually -- the producer
13 generally, unless you register or buy directly, has no
14 idea who the purchaser is. So, the interest of keeping
15 this personal to the mass market licensees is not
16 really there. So, if everything else were equal, there
17 probably should have been a strong presumption against
18 restraints of alienation, perhaps a special notice on
19 the package saying that you may not -- you may get
20 this, this is for your personal use only, and you may
21 not transfer it, but at least some warning, and there
22 might have been a strong presumption that this is
23 merchantable because it's -- you assume that someone
24 has tested these things. This is quite different from
25 the situation where you do custom-developed software.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Instead we have internal justification. It's
2 interesting that if you read UCITA carefully that it
3 says in -- basically in 209 -- right, in 208, it says
4 that it -- that the right to refund can be satisfied by
5 a legal requirement, and that legal requirement is
6 UCITA itself. So, automatically it will say in mass
7 market licensing you have a right to refund. There is
8 a right to refund under UCITA, therefore this -- and
9 that was built in there I think for a particular
10 purpose.

11 The basic problem and the very subtle problem I
12 have had with UCITA is it really shifts the balance
13 fundamentally. The recipient of the product is always
14 charged with reading the terms. On the other hand, the
15 provider of the product can be excused from even
16 looking at their purchase order or whatever as long as
17 it supplies some term in the product delivered that is
18 materially different.

19 What that does is it defeats the possibility of
20 having a contract at that time. This is contrary to
21 UCC 2 and Carl Llewellyn's idea of -- his idea of
22 blanket assent and saving the deal. The deal only
23 happens when someone clicks, and then the upshot of
24 that is that if I'm advising a client, I'd say, if you
25 really want to have the last shot, you should always

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 put something that's materially different in your
2 product. That way, there's no contract that's formed
3 before, and the only contract that would be formed is
4 when you click.

5 I find there's something wrong with that, and I
6 think that this is -- this shift in regulation is in
7 favor of the provider of a product.

8 MS. HARRINGTON: Steve, can we move through?

9 MR. CHOW: Okay.

10 MS. HARRINGTON: Thank you.

11 MR. CHOW: Some of these I think Jean Braucher
12 may talk about, and I will certainly put these slides
13 up and we can raise these. The assent issue is --
14 continues to be an important one. UCITA in my view
15 exacerbates the opacity of the software industry. We
16 have talked about cognitive issues yesterday. The fact
17 is that a loading dock worker will probably not sign
18 something, but an IT staff person almost invariably
19 will click through, even type in XYZ Corporation. So,
20 this opens the -- some question marks for businesses
21 generally and consumers, as well.

22 I think other people will cover this, I think,
23 UCITA defeats the first sale doctrine. I just want to
24 point -- call your attention to some of the cases. DSC
25 Communications is listed right in the introduction of

1 UCITA as being an exemplary case. If you look
2 carefully at the case, though, the open market
3 transaction is treated differently, and for the reason
4 that it's not negotiated, and under UCITA, you may buy
5 a CD and you may own it, but when you click, you divest
6 yourself of that ownership of the disk.

7 Just some recent cases, these are
8 pro-shrinkwrap, these are sort of in between, and these
9 three are actually -- the know Novell case and the
10 Mendoza case are suggestive that there is some question
11 about shrinkwraps.

12 In summary, I think I agree with Professor
13 Kobayashi that we need competition, but we don't need
14 to give those with market power additional contracting
15 power, and we don't need to establish a climate
16 burdening innovation, disfavoring small developers, and
17 we need a critical mass of informed consumers. So, we
18 may require some pretransaction availability, at least,
19 on the net or otherwise.

20 These things -- I don't want to ask the FTC for
21 any rulemaking. I think some clarification is probably
22 good for at least a start, but I want to recognize that
23 there are barriers to exit, that is, you don't just
24 walk the site on your feet, you have an e-mail address,
25 you have -- you are a community and your instant

1 messaging, your buddy system, whatever, and it's hard
2 to change.

3 Finally, I think retaining UCC 2 is applicable
4 to software, especially in those jurisdictions that may
5 or may not adopt UCITA in the future, and many of us
6 may adopt UCITA if it has appropriate amendments, but
7 at this time we think that having UCC 2 applies to this
8 important area. Thanks.

9 MS. HARRINGTON: Thank you very much.

10 Turning now to Delegate Barve, Maryland is the
11 first state to have implemented UCITA --

12 MR. BARVE: Right.

13 MS. HARRINGTON: -- and Delegate Barve, could
14 you talk to us about your view that this is a positive
15 development for the citizens and consumers of Maryland.

16 MR. BARVE: Sure. Do you mind if I sit here
17 since I've spread stuff out?

18 MS. HARRINGTON: Not at all.

19 MR. BARVE: I tend to have lower back problems
20 if I stand for too long.

21 First of all, thank you for inviting me. My
22 name is Kumar Barve, I represent Gaithersburg and
23 Rockville, which is sort of the IT corridor,
24 high-technology corridor for the State of Maryland,
25 hopefully won't be the only high-technology corridor in

1 the State of Maryland, and that is changing, so that's
2 a good thing.

3 Let me begin -- I suspect there is going to be
4 a lot of talk about the specifics of the NCCUSL package
5 and perhaps there will also be specifics about the law
6 that we passed in Maryland. Let me set the context of
7 how we operated in the State of Maryland so that you
8 understand this. First of all, let me just say that
9 I'm a Democrat. I'm traditionally thought of as being
10 a liberal to moderate Democrat. I'm the chair of the
11 Subcommittee on Science and Technology, which had eight
12 active members, and our membership spanned everything
13 from liberal Democrats to a very conservative
14 Republican.

15 Most people were sort of to the left of the
16 center of the spectrum. Most of the members of my
17 subcommittee are people who made their careers beating
18 up on HMOs and kicking the butts of businesses
19 generally. So, this is not a group of people who are
20 normally very sympathetic to the business community in
21 our legislature.

22 We had a great deal of public hearing on this
23 matter. To begin with, I think the first public
24 hearing was a three-hour event, which had opponents and
25 proponents of the bill. We then -- what I chose to do

1 is I took the piece of legislation and broke it down
2 into 10 or 11 basic parts, and we had I think eight
3 two-hour work sessions that typically began at 8:00 in
4 the morning and went on until 10:00 in the morning to
5 look at each of these issues individually, and as the
6 discussion proceeded on the House side -- by the way,
7 the Senate had a similar amount of public hearing, and
8 then when the bills came out of the two houses, they
9 were different, and we had -- we spent about three
10 hours officially and maybe a couple more hours
11 unofficially in the conference committee process.

12 A couple of things began -- a couple of points
13 of view among my colleagues in the subcommittee began
14 to emerge. Primarily we saw a couple of problems with
15 UCITA as it was drafted by the Uniform Law
16 Commissioners. We felt that it wasn't up to the
17 consumer protection standard that we in the State of
18 Maryland have. We reacted very negatively to
19 electronic self-help, especially in the consumer
20 setting. We began to come to the conclusion that
21 allowing a software manufacturer to use a shrinkwrap
22 license agreement to protect his or her intellectual
23 property was a fundamentally sound public policy. We
24 had no problem with that.

25 The very idea of upholding a contract -- I'm

1 not an attorney, but I learned all sorts of neat terms,
2 like contracts of adhesion. The idea of upholding the
3 idea of a contract of adhesion in a software setting
4 ultimately seemed to be a pretty reasonable thing to
5 us. We heard, of course, first and immediately from
6 the very largest software companies in the United
7 States, software companies like Microsoft and Adobe
8 and others like that, but then later we began to hear
9 from smaller software companies. I began to hear from
10 my friends who wrote software in Gaithersburg, Sequoia
11 Software in Howard County, Maryland, U.S.
12 Internetworking, which I think was smaller then than it
13 is now, and we began to coalesce -- our opinions
14 coalesced around a couple of things.

15 First of all, as I said, we decided that a
16 shrinkwrap license agreement or a clickwrap license
17 agreement wasn't any more of a problem than this little
18 warranty agreement here with your -- I bought a garden
19 claw, which is supposed to help you cultivate your
20 lawn; in fact, it's really good at throwing out your
21 lower back. And the only reason anyone should tolerate
22 this thing that nobody reads that's inside the box is
23 because in Maryland and at the federal level we have a
24 lot of consumer protections. So,.

25 We came to the conclusion that we were

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 perfectly happy to allow software manufacturers to
2 protect their intellectual property with contract
3 language if we took away from them the ability to
4 disclaim or modify warranties of merchantability,
5 informational content or system integration, and that's
6 essentially what we attempted to do in the Maryland
7 version of UCITA.

8 We took away from software manufacturers the
9 ability to disclaim those kind of -- disclaim or modify
10 those type of warranties. So, it's our hope that after
11 October 1st, if you bought software as a consumer or as
12 a small business under certain circumstances and the
13 software doesn't work, you can go back to the
14 manufacturer or back to the retailer and demand a
15 refund, just as you can get a refund for a tangible
16 good that doesn't work.

17 We came to the conclusion, also, and I don't
18 know what the federal effect is, because I don't know
19 federal law, but we came to the conclusion that
20 Maryland consumer laws do not really apply to software.
21 Maryland's consumer laws clearly apply to consumer
22 goods, things that you buy and then you own them. Most
23 software, when you buy it, you don't own it. You're
24 getting a license. We wanted to make absolutely
25 certain that in the State of Maryland, when you

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 purchase the right to use Quickbooks or Microsoft
2 Office, that you would have the same Maryland consumer
3 protections that would apply to you if you bought a
4 shovel. That was our intent.

5 MS. HARRINGTON: Let me ask you one question on
6 that, if I may. The little FTC Act in Maryland --

7 MR. BARVE: I'm sorry, the what?

8 MS. HARRINGTON: The Maryland unfair and
9 deceptive practices statute requires or favors presale
10 disclosure, and UCITA permits post-sale disclosure.
11 How did you deal with that inconsistency, if you did?

12 MR. BARVE: Well, you know, the way -- as a
13 practical matter, what we -- the perspective we took is
14 that virtually everything you buy nowadays if it's
15 electronic or complex has at the bottom of the box
16 underneath the styrofoam a piece of paper which has
17 terms and provisions which normal people do not bother
18 to read, and those terms and conditions are binding on
19 the sale of the thing that you buy, and the perspective
20 we took was that clickwrap license agreements were
21 fundamentally undifferent, and this was not a problem,
22 but that what we wanted to make absolutely certain was
23 that while it's true you buy a VCR, there's a piece of
24 paper at the bottom of the box that says something that
25 nobody reads, that's okay as long as you have consumer

1 protections in the State of Maryland.

2 We felt that it was impractical to have, as
3 with most complex electronic components that you buy
4 and with software, you know, we thought that
5 prenotification was impractical for two -- well, for
6 the main reason that the consumer isn't going to read
7 it. I mean, think for a moment about all the pieces of
8 paper you have to sign when you're buying a car or
9 buying a house.

10 In the House Economic Matters Committee, we
11 every other year include another notification to
12 consumers, and, you know, I just know they don't read
13 it. So, to me the primary issue is do the consumers
14 have the legal protections when things go wrong down
15 the road? To me, that's the primary thing, because
16 nobody reads notifications, okay? So, that's the way
17 we -- that's the way we processed that thought -- that
18 issue area.

19 Let's see, where was I going to go to next?
20 Self-help, we just flat prohibit it in the consumer
21 market, and we say in the nonconsumer market that we
22 basically apply a great deal of -- to begin with, we --
23 if I remember correctly -- Connie, how many days notice
24 do you have to give, is it 45 now --

25 MS. RING: Thirty days in Maryland.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 MR. BARVE: Yeah, 30 days in Maryland, it's
2 been a while since I've looked at the bill, but what we
3 do say is that you cannot by contract lower the number
4 of days. We say that the -- if you invoke -- want to
5 invoke self-help, you have to give notice and
6 notification to the consumer so that they have an
7 opportunity to remedy the accused breach of contract.
8 If you wrongly invoke self-help, you are, as the
9 creator of the software who invokes self-help, liable
10 to virtually -- you're liable to an enormous amount of
11 liability, and as a business person, I would be very
12 hesitant to invoke self-help in Maryland given the
13 provisions that we've put into our law.

14 Choice of law and choice of forum was an issue
15 that was very, very hotly debated. Essentially what we
16 say with respect to -- obviously Maryland consumer law
17 trumps any agreement, so Maryland consumer law under
18 the original version of UCITA and under our version of
19 UCITA is a controlling factor in the consumer forum.

20 Choice of forum is something that will be
21 adjudicated by a Maryland court. If you're a consumer
22 and you download software from a Utah software
23 manufacturer and you live in Montgomery County, you go
24 to the courthouse in Rockville, and the judge is going
25 to decide what the reasonable choice of venue is going

1 to be. If it's software -- if it's a software company
2 like Microsoft or Corel WordPerfect, you know, the
3 Corel Corporation, which is a Dublin, Ireland
4 corporation, I think a court of competent jurisdiction
5 is probably going to find they have an adequate nexus
6 in the State of Maryland to have that case adjudicated
7 in the State of Maryland.

8 On the other hand, if it's a Utah software
9 manufacturer, you didn't -- you downloaded the
10 software, so there wasn't a tangible medium that was
11 delivered to your place of residence, and they're a
12 small company in Utah and they say their choice of law
13 and choice of forum is Utah, chances are that Maryland
14 judge is going to say, choice of law, choice of forum
15 is Utah.

16 Some people in Maryland General Assembly were
17 concerned that Maryland judges would be applying
18 consumer laws of the state of Virginia or the state of
19 Utah or the state of Alaska. Hey, it happens all the
20 time right now, at least that's what my girlfriend the
21 attorney tells me.

22 We amended the Maryland long-arm statute to
23 make it clear that Maryland would have legal ability in
24 the case of computer information transactions to have
25 -- to claim jurisdiction over a contract from out of

1 state.

2 Let's see -- so, essentially, I mean, without
3 going into a great deal of detail, I see my ten minutes
4 are just about up. So, let me just say that in the
5 end, the conclusion that we came to unanimously, as a
6 subcommittee, was that we were comfortable with -- oh,
7 there was -- excuse me, let me interrupt myself.

8 Another very contentious issue was the effect
9 of UCITA on the libraries, and I see some of my friends
10 from the University of Maryland system and elsewhere
11 are here, Hopkins I think also, are here. They
12 strongly objected to the notion that -- in their view,
13 of course, the fair use doctrine in the U.S. copyright
14 laws could be very quickly evaded by contract language,
15 and that may be -- you know, we felt that it is better
16 to give software manufacturers the ability to protect
17 the fruits of their labor.

18 If there are abuses in the system, we can
19 always come back and write a specifically crafted law
20 to address that abuse. We've done it many times, and
21 just about every law we pass, every major law we pass,
22 has some unintended consequence, and that's why we meet
23 every year.

24 It's interesting, because actually my
25 girlfriend teaches a business law class at Prince

1 George's Community College, and she had me teach the
2 section on -- they went a little bit into UCITA, and
3 these are -- you know, these are bright people, a
4 variety of ages, and I put it to them, should a book
5 and a piece of software be handled, aside from what the
6 law is, should a book or a piece of software
7 fundamentally be handled in exactly the same sort of
8 way? Should you be able to buy a book? You can buy --
9 the library can buy a book and loan it out to somebody
10 and they return it. Should you be able to buy a piece
11 of software and loan it out to people?

12 And it took them less than ten seconds to come
13 to the correct conclusion, no, you shouldn't, because
14 they're fundamentally different things. You can't
15 download a book into your computer and e-mail it to 50
16 of your friends. You can download software into your
17 computer and e-mail it to 50 of your friends. They are
18 physically, tangibly and practically different things.

19 It is completely reasonable -- we felt
20 unanimously that it was completely reasonable to give
21 software writers the ability to protect the fruits of
22 their labor through a clickwrap license.

23 Now, if Britannica or Groliers or somebody
24 begins to muscle in on our University of Maryland
25 system and our Hopkins or our Montgomery County library

1 system, I have no doubt that we will be able to quickly
2 command a majority in both houses to fix the problem if
3 they begin to transgress, because we very much value
4 our library systems and our University of Maryland,
5 which by the way, Maryland and Hopkins are part of the
6 reason we're leaders in biotechnology in Maryland, and
7 we're not going to do a damned thing to endanger that.

8 So, let me summarize -- I've gone over my ten
9 minutes. Let me summarize my saying that we
10 fundamentally had no problem with contracts of adhesion
11 in the software environment as long as there was
12 adequate consumer protection for the people in the
13 State of Maryland.

14 The final thing I want to say is that we have a
15 joint House-Senate Technology Oversight Committee which
16 is going to meet in December, and we're going to
17 continually meet on issues relating to UCITA which went
18 into effect I guess 27 days ago. It's too early to
19 tell what the impact of UCITA is going to be yet, but
20 essentially we spent a lot of time on this. This is
21 the most complex issue since electric deregulation that
22 Maryland has faced, and, of course, I'm biased, I think
23 we did a good job.

24 MS. HARRINGTON: Thank you very much, Delegate
25 Barve.

1 Professor Braucher?

2 MS. BRAUCHER: Yeah, I want to start by going
3 back to some process questions that came up yesterday
4 in the first panel on UCITA where Mary Jo -- is it
5 Dively or Dively? -- Dively talked about some
6 appearances by the Consumer Project on Technology and
7 Consumers Union at the Article 2-B and later UCITA
8 process.

9 You should know that both of those
10 organizations strongly oppose UCITA. In fact,
11 Consumers Union sent a letter to NCCUSL objecting to
12 representations being made about their participation
13 and input without noting in addition that they oppose
14 UCITA.

15 NCCUSL does not do this to business groups that
16 show up at some meetings and then say we're not
17 satisfied with the product. They don't then go around
18 and say, you came, so you had your shot. And one
19 effect of this is actually to discourage consumer
20 participation in the process, in the NCCUSL process, to
21 go around saying, oh, they had their shot because they
22 came to the meetings, that means somehow that confers
23 approval.

24 As Delegate Barve can I'm sure tell us, that
25 industries were quite vociferous, the industries that

1 were unhappy with UCITA in the Maryland process, and
2 they negotiated some deals -- this was for the movie
3 industry, sound recording, telecommunications, you had
4 all those folks show up, right?

5 MR. BARVE: And insurers.

6 MS. BRAUCHER: And insurers, but they are not
7 happy with what they got, they still oppose UCITA.

8 MR. BARVE: They are too busy denying claims to
9 their HMO customers.

10 MS. BRAUCHER: Anyway, the industry deals there
11 were then put back in the uniform version of UCITA.
12 The few consumer gains were not put back into the
13 uniform version. For example, there's an important
14 amendment that was made in Maryland to try to save the
15 Consumer Protection Act by explicitly saying that UCITA
16 transactions, even if they're denominated licenses,
17 will be covered by the Consumer Protection Act in
18 Maryland.

19 Well, that ought to be as a suggestion part of
20 the uniform text of UCITA, that there ought to be
21 something that says if your state consumer laws are put
22 in terms of sales, you should, just to make sure
23 there's no issue, say that that consumer act applies to
24 UCITA licenses, but NCCUSL didn't do that, right? You
25 see that the consumer gains don't get put back into the

1 process.

2 Similarly, Maryland did something significant
3 in making implied warranties of merchantability
4 nondisclaimable. That didn't go into uniform UCITA.
5 It didn't even go in as an option, which is one format
6 that NCCUSL uses, they call bracketed provisions.
7 There are eight states, eight or nine states, that have
8 this approach in the law of goods. It should have been
9 a bracketed provision, if you do this for goods, you
10 should do it for software if you're going to consider
11 software something other than goods. So, this is a
12 process that is not hospitable to incorporating
13 consumer protections.

14 Now, I want to raise a few issues that maybe
15 we'll get a chance to come back to, and I'll try to go
16 over them very lightly here. Again, Mary Jo Dively
17 talked about warranties in UCITA. Basically what UCITA
18 does is it provides a roadmap for disclaimer of
19 warranties, and Mary Jo talked about, well, then, you
20 know, the point of having these warranties in UCITA is
21 then when they're disclaimed in the first document you
22 get from the licensor, you can go back -- and these
23 were her words -- and bargain to get those warranties.

24 Well, we all know that doesn't happen in the
25 consumer context, which is why it's a good idea to have

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 the approach that Maryland does in making these
2 nondisclaimable.

3 I should add that that doesn't really restrict
4 freedom of contract, because all it ends up meaning is
5 that you need a bolder disclosure, that you can't say
6 that this is word processing software. What you can
7 say is that this is buggy software that may or may not
8 do word processing, you know, that you have to make
9 that kind of bold redescription of the goods in order
10 to get out of it if it was for ordinary purposes.

11 All right, other issues, there's a fundamental
12 public policy provision in Section 105-B of UCITA.
13 This is touted as sort of the solution to all of the
14 problems of information and competition policy under
15 UCITA. Well, this provision is actually weaker than
16 the restatement section of contracts public policy
17 provision. The restatement doesn't use the word
18 "fundamental," so that what you've done is you've
19 raised the standard in UCITA from what it would
20 otherwise be under the common law of contract. Section
21 178 of the restatement does not require a fundamental
22 public policy.

23 Another provision that's sometimes touted as
24 important is there's a consumer error provision in
25 Section 214. Well, this is eliminated if the seller or

1 the so-called licensor has a confirmation process. So,
2 even though the licensor has done nothing to fill your
3 order and you call them up and say, I made a mistake,
4 this provision will do you no good if they had a
5 confirmation process. So, really all it does is it
6 forces a confirmation process, but it's not as good as
7 the common law of mistake. If it's an apparent
8 mistake, you have an individual ordering, you know, a
9 hundred copies, the common law of contract would treat
10 that as something that the person on the other side
11 should reasonably realize is a mistake before they
12 start sending that to an individual.

13 The right of refund in UCITA, much touted as a
14 new consumer protection. Well, this is a right, as
15 Steve Chow had mentioned, this is a right that it's not
16 required under UCITA be disclosed. Well, this is not a
17 consumer protection statute. You have a right of
18 return, but you're not told about it?

19 Now, I think probably most licensors will tell
20 consumers about it, but that should have been put in
21 the statute. They will probably tell them because
22 there's an argument that it's unconscionable not to.
23 Well, there we get, again, into unconscionability is
24 supposed to be the solution to all the consumer
25 protection problems here. Unconscionability is not a

1 usable theory because it's so fact-sensitive. It's
2 very expensive to litigate an unconscionability case.
3 That's why we have consumer protection laws that give
4 attorneys' fees, multiple damages, class actions. You
5 need those sorts of things, and unconscionability is
6 just not a good theory. You know, it was called "The
7 Emperor's New Clause" when it was put into the UCC, and
8 now suddenly it's, oh, this will solve all your
9 problems.

10 The right of refund also is not a new consumer
11 protection if you think about ordinary contracting
12 norms that one has a right to review the terms and opt
13 in, decide then, do I want to exercise my freedom to go
14 into this contract? But what this does is say you make
15 the contract first in any sort of practical sense in
16 that you've paid for it, you've taken delivery, and now
17 you get a chance to opt out, and that's called a new
18 consumer protection? I don't think so. It's a carve
19 -- it's a cut-back from what you would have under
20 ordinary contracting principles.

21 The conspicuousness definition in UCITA, it's
22 based on -- it starts with the more than 50-year-old
23 preconsumer movement definition in the UCC, and the UCC
24 case law is actually better than UCITA; that is, it
25 says you have to meet the general standard in

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 conspicuousness of notice, that a reasonable person
2 would have noticed this. Well, UCITA instead in the
3 comments builds in a notion that there are some ways of
4 doing conspicuousness that are safe harbors, for
5 example, contrasting type, and as a result the
6 placement doesn't matter.

7 Well, if the so-called conspicuous term is way
8 down at the bottom of a website in contrasting type,
9 that doesn't do much good if nobody would notice it,
10 and nobody will when it's placed in that way.

11 Now, the UCC standard itself ought to be
12 improved upon in light of all of the expertise that's
13 been developed over the last 50 years and particularly
14 since the sixties. Placement is important, it's very
15 important. These days you can empirically test whether
16 people are accessing a disclosure; that is, you can
17 keep track of whether they're clicking. That ought to
18 be built into UCITA, that if you have information that
19 people are not accessing this, that you have to change
20 how you're disclosing it.

21 There should have been a requirement of plain
22 language, of readability, of prominence, the idea of --
23 and here's the other problem, if you have a definition
24 of conspicuous, but what we're talking about is
25 post-payment disclosure that's conspicuous? What good

1 does that do? It needs to be before you pay that you
2 get the disclosure.

3 Now, you know, I think fortunately we have the
4 Federal Trade Commission Act. Maybe we'll eventually
5 get some kind of overlay of you can pick a few key
6 terms that ought to be disclosed prior to payment and
7 that have to pop up on the screen and the person would
8 have to click to, something like that might start to
9 address some of the problems caused by UCITA.

10 Let me see, I just want to touch a couple of
11 other issues. There's this future changes provision in
12 304 of UCITA. What this entails is you put a
13 boilerplate provision in inconspicuous language, and it
14 says we can keep changing the contract simply by
15 notice, and then notices and methods of receipt are
16 defined in UCITA so that you could post the changes to
17 your website so you can be increasing the price on,
18 say, an internet service provider agreement by posting
19 to the website, and this is all authorized by some fine
20 print provision at the outset.

21 Now, luckily, again, we have the Federal Trade
22 Commission Act that's probably going to say that that's
23 an unfair and deceptive practice, but UCITA didn't take
24 that into account. In fact, it creates the problem
25 with this Section 304.

1 Another issue that was listed as one that you
2 were interested in for this topic is the relationship
3 between e-sign and UCITA. There's a new section in
4 UCITA as of this past summer, and I don't think this
5 made it into Maryland, so you have a chance to fix
6 something in Maryland, it's Section 905 is the new
7 provision, and it says we're superceding and overriding
8 e-sign.

9 Now, I don't think this will pass muster under
10 e-sign, because I don't think UCITA is consistent with
11 e-sign in that it doesn't have the consumer consent
12 provisions to electronic disclosure that e-sign has,
13 but what states should do, rather than what NCCUSL is
14 suggesting in 905, to override the consumer protections
15 in e-sign or at least create an issue about that, is
16 that states should put in language that says nothing in
17 this act is intended to modify, limit or supersede the
18 provisions of Section 101-B through E of the Federal
19 Electronic Signatures and Global Electronic Commerce
20 Act to explicitly preserve the federal consumer
21 protections.

22 I mean, we have a very disturbing effort here
23 by NCCUSL to try to override federal consumer
24 protections, and I don't think it will work, but why
25 put everyone to a lot of effort in litigating that?

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 MS. HARRINGTON: Professor, could you wrap up?

2 MS. BRAUCHER: Yeah, let me just mention a
3 couple things.

4 Self-help, which was brought up before,
5 unfortunately I think you attempted to eliminate
6 self-help in Maryland, but I don't think you succeeded,
7 because there's another section, Section 605, which is
8 electronic regulation or performance, and under
9 605-B-3, that permits a disabling after the expiration
10 of a stated duration.

11 Now, this becomes a roadmap for how, you know,
12 Mel Farrar in Detroit can do his disabling of leased
13 vehicles. You license some software in the vehicle
14 that would allow you to shut down the car, you do it on
15 a weekly duration, and if you don't pay your bill, we
16 shut your car down, and that's a way to use UCITA to
17 get a right that Article 9 does not permit. Article 9
18 does not permit remote disabling of cars, of consumer
19 goods, but UCITA through this tricky provision of 605
20 is a roadmap for that kind of sleazy practice. I don't
21 think you probably realized that when you did this.

22 MR. BARVE: No, we knew what we were -- but I
23 didn't know that -- we didn't consider shutting down a
24 car but shutting down a piece of software, yeah.

25 MS. BRAUCHER: Yeah, shutting down a car is

1 permissible now, because you can opt into UCITA for the
2 whole transaction if you license a piece of software as
3 part of the transaction. So, that's what you've
4 enabled here, remote shut-down of cars.

5 MR. BARVE: That we'll have to look at.

6 MS. BRAUCHER: Yeah, I think you should.

7 Then there are provisions on -- could I just
8 mention two more?

9 MS. HARRINGTON: Sixty seconds.

10 MS. BRAUCHER: Okay, choice of law and choice
11 of forum. The default rule on choice of law in
12 electronic delivery is the licensor's place of
13 business. So, it's a remote law for the consumer. And
14 in addition, even worse is that there's a choice of
15 forum provision in UCITA that uses an admiralty case
16 from the Supreme Court that is essentially a test --
17 the test that's used in this choice of forum provision
18 is unlimited choice, even in consumer transactions.

19 The UCC doesn't even have a provision
20 authorizing choice of forum. So, this is going way
21 beyond the UCC. It's not as consumer friendly as the
22 UCC. In many ways UCITA is like that.

23 MS. HARRINGTON: Thank you. And we're really
24 getting into the weeds here, this is very rich. Let me
25 just pose a question that really is a rhetorical

1 comment of interest from Carol Kunze. It's a question
2 for Professor Braucher, but I'll just read the
3 question, and I don't know that it needs discussion,
4 but the point is -- do you want discussion? --
5 Consumers Union criticized software licenses for
6 including terms which Consumers Union itself uses in
7 its contracts. Why is it fair for Consumers Union to
8 impose New York laws and forum on consumers but not a
9 software developer?

10 MS. BRAUCHER: Well, let me start by saying I
11 don't represent Consumers Union.

12 MS. HARRINGTON: Right.

13 MS. BRAUCHER: I'm an independent person here.
14 I have my own views on this, but I think it's important
15 to realize that Consumers Union, which is a licensor,
16 opposes UCITA, and they say we are very happy to live
17 with a model of pretransaction disclosure, because
18 that's in the consumer interest.

19 Now, the specific provision that's always
20 raised is the one that was brought up yesterday about
21 they try to protect their trade name by restricting use
22 of their endorsements for -- in commercial advertising.
23 My understanding is that that's actually been upheld in
24 some court cases, that they can do that, and I don't
25 know the basis, but, you know, it's -- the trotting out

1 of this example over and over also seems to be a way to
2 try to silence Consumers Union in their participation
3 in the process.

4 MR. CHOW: I want to make one comment about
5 that statement. Most of what Consumers Union does is
6 content as opposed to software, which I personally
7 think they are much more akin to goods. So, I think
8 there may be different rules between those two.

9 MS. HARRINGTON: Thank you.

10 Connie Ring is also a state law commissioner
11 and chaired the NCCUSL drafting committee on UCITA.

12 MR. RING: Thank you very much for the
13 opportunity to be here. I'm a volunteer. All of the
14 commissioners on uniform state laws are in that
15 category. We volunteer a lot of time for improvement
16 of the law.

17 The NCCUSL is 110 years old. We do a lot of
18 different uniform law projects. If you have a donor
19 designation on your license plate, that's because of
20 the Uniform Anatomical Gift Act. If you are involved
21 in transfers to minors, that's a uniform act, the
22 Partnership Act, the Inter-Family -- Interstate Family
23 Support Act, they go after delinquent parents for not
24 paying support, they are all acts of the conference.
25 We are very proud of what we do. We think we improve

1 the law in many respects.

2 One of the areas that we had spent a lot of
3 time on, of course, is commercial law, and I think that
4 if you think about it it is very clear that there needs
5 to be uniform rules in connection with the new
6 energizing element of the information age. It's a
7 transformation that is equivalent to the industrial
8 revolution which transformed our economy from an
9 agricultural farming economy to an industrial economy.
10 It is the engine that is driving our economy.

11 And the illustration that I like to give is I'm
12 sitting in an airplane with my laptop open, I'm tapping
13 into a database. I don't know where the other party on
14 the other side is located. The party with whom I am
15 dealing and with whom I am contracting for that
16 information in obtaining a license doesn't know what
17 state I'm flying over. It is a faceless and orderless
18 kind of contract. It is different than the experience
19 that I have had most of my paper world contracting life
20 where I have been dealing face to face across the table
21 with the other party with whom I am negotiating.

22 I know that they have authority. I know that
23 they have understood the terms. We initial each page
24 of the paper, and we each sign the agreement, but when
25 I am dealing in that airplane, no one knows where the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 other party is, and it creates an intolerable situation
2 if you think about it for a moment that if I happen to
3 be flying over State X, I've got a valid contract, but
4 if I'm flying over State Y, I don't have a valid
5 contract or a contract term.

6 Now, there are two ways to achieve uniformity.
7 One is by virtue of enactment at the state level of a
8 uniform set of rules. The other way is by federal
9 enactment. Generally contract law has been state law.
10 Indeed, much of my career has been in government
11 contracting, and you will have repeated cases in the
12 federal courts in which they say we have no federal
13 contract law, and therefore, they have to appeal to
14 state law in order to be able to interpret or apply a
15 rule that may apply to a particular government
16 contract.

17 And so the appropriate accommodation and
18 integration of contract law really is at the state
19 level, and therefore the reason for the conference to
20 undertake a project, to try to bring about some common
21 rules to this exciting new era of the information age.

22 Let me point out that there are a number of
23 projects at the conference, one which is underway, one
24 which was consumer credit code, where we had very
25 actively engaged in trying to spell out rules that

1 relate to consumer protections. It has been difficult,
2 because the policies of the various states do vary, and
3 it's difficult to achieve uniformity in connection with
4 consumer protections. And therefore, in connection
5 with Article 2, for example, Article 2-A and Article 9
6 of the Uniform Commercial Code, in effect, what the
7 code does is defer to local consumer protection laws,
8 and it is the same policy that has been adopted in
9 connection with UCITA as a uniform act.

10 In the current version of the Act, after 105,
11 there is a legislative note in italics very prominently
12 after the black letter which reads as follows:

13 "The purpose of subsection C is to make clear
14 that this Act does not alter the application to
15 computer information transactions of the substantive
16 provisions of a state's consumer protection rules or
17 statutes, including rules about the timing and content
18 of required disclosures, and does not alter the
19 application of the state statutes given regulatory
20 authority to a state agency such as the Office of the
21 Attorney General.

22 "It may be appropriate for purposes of clarity
23 in subsection C to cross-reference particular statutes,
24 such as a state's Unfair Deceptive Practices Act, by
25 inserting 'including, cite the statute.'" And the

1 purpose of that is to make very clear that on a
2 state-by-state basis, they need to do exactly what was
3 done in Maryland and as being done in Virginia, which
4 is to make sure that there is a synchronization between
5 the consumer statutes of the state and the operation of
6 this general policy statement in subsection C, that
7 there is an intent that consumer protection rules of
8 the state will trump any provision that may be in the
9 UCITA contract.

10 So, we did, in fact, put this clarifying
11 statement in in order to make our intent clear --

12 MS. BRAUCHER: Are you advocating that in
13 Virginia?

14 MR. RING: We certainly are.

15 MS. BRAUCHER: All right, I hope you will.

16 MR. RING: And there is an amendment that the
17 Attorney General's Office is putting forward in that
18 regard.

19 MS. HARRINGTON: Connie, let me ask a question
20 about the comments and the notes and how they relate to
21 the text, and one question that comes up is why more of
22 what is in the comments and the notes isn't in the
23 plain text and what's the legal effect of -- do you
24 think of the notes?

25 MR. RING: Well, the tradition in the

1 conference is and has been similar to the idea of the
2 Constitution of the United States, that you can't
3 envision all the factual circumstances in which a
4 particular general principle will apply. For example,
5 due process of law. It has a lot of meaning, it has
6 developed over a period of time, but if you try to
7 specify every circumstance where there may be a
8 violation of due process, you might not catch them all,
9 and so you have in the Constitution and in many
10 statutes a general statement.

11 The official comments are sort of to flush that
12 out a little bit and give examples. Under the Uniform
13 Commercial Code and other instances, attorneys and
14 their clients, when they're in litigation, frequently
15 will look to the official comments and cite them;
16 however, the Court is guided by the black letter, not
17 the official comments, and the official comments are
18 simply to hope to give some guidance to the Court so
19 that there is more uniform application of the general
20 principles. That is done in the Uniform Commercial
21 Code, it is done in this Act, and it is also done in
22 many of the other uniform acts of which I spoke.

23 In connection with the special provision in
24 Maryland, one of the purposes here is to have equity
25 between all kinds of commerce, and in Maryland,

1 contrary to the situation in virtually all the other
2 states, there are a few other states that follow
3 Maryland but not many, you can disclaim with respect to
4 tangible goods, implied warranties --

5 MR. BARVE: Cannot?

6 MR. RING: Excuse me?

7 MR. BARVE: Did you say cannot?

8 MR. RING: That you can disclaim.

9 MR. BARVE: Okay.

10 MR. RING: However, in Maryland, there has been
11 on the books since I think it's 1984 an amendment which
12 provides as an added consumer protection that you can
13 dis -- cannot disclaim with respect to goods certain
14 implied warranties. Therefore, all commerce in
15 Maryland with the amendment that was put in by the
16 committee that Chairman Barve chaired are subject to
17 the same rules, whether it's goods or whether it's an
18 intangible. And when I first spoke at the first
19 hearing and this issue came up, I said if that's a part
20 of the consumer protection rules with respect to
21 Maryland, that certainly we probably could come up with
22 language that would deal with that, and, in fact, the
23 committee did.

24 I think that they perhaps did not do it
25 perfectly, because you heard the issue earlier

1 yesterday in connection with open source code. There
2 was an effort to try to accommodate that as an
3 exception in Maryland. I'm not quite sure whether the
4 words accomplish the objective, but the objective was
5 clearly to provide that if it's cost-free software with
6 a source code, that then you could disclaim it.

7 Let me speak about a few other things. I am
8 sure I am not going to cover everything that I would
9 like to, but I would like to mention specifically
10 implied warranties. There was certain development of
11 that theme before, but I want to point out what the
12 current law is. The restatement of contracts, which
13 was an effort by the ALI to restate the common law, is
14 silent, not one word about implied warranties. And the
15 reason for that is very clear, that that is a statutory
16 development. Implied warranties are basically
17 statutory in nature.

18 Therefore, there has been a question in
19 connection with software, do you have implied
20 warranties at all? Now, there have been some cases in
21 connection with software where it's on a tangible
22 product, a diskette, in which it has been held that the
23 employed warranties of Article 2 do apply, but as you
24 heard yesterday, increasingly the trend is going to be
25 without a physical medium, and therefore, in fact, you

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 are going to have downloading that has all electronic
2 components or a service kind of element.

3 We think that it was a substantial advance in
4 the law to include implied warranties, including the
5 the new implied warranties that Mary Jo Dively
6 indicated.

7 The second thing that I want to make clear is
8 that express warranties are still there. Express
9 warranties under Article 2 and also under UCITA are not
10 easily disclaimed. In fact, it's almost impossible to
11 disclaim them. I say that from a lot of experience in
12 regard to both litigation on behalf of Atlantic
13 Research and our experience in that regard.

14 If you make a representation in your literature
15 and in your advertising, you can't disclaim that
16 express warranty, and therefore, in many instances,
17 what might be an implied warranty or even encompassed
18 within an implied warranty and disclaimed is going to
19 be covered by an express warranty, and the express
20 warranty can't be disclaimed under ordinary
21 circumstances, and therefore, it still is binding upon
22 the licensor.

23 In connection with the mass market, we thought
24 that this likewise was an advance in the law. I think
25 if you were to survey the federal law and also the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 state law, you would find almost always that special
2 protections are extended to the consumer only, and
3 basically we were concerned and felt that it was
4 appropriate to provide the same protections when
5 someone is dealing in the same marketplace with the
6 consumer, even though it may be a Dupont or Atlantic
7 Research, in having the same protections that are
8 extended to the consumer. Therefore, it was born the
9 concept of the mass market. We think that's an advance
10 in the law.

11 I'm going to speak very quickly about
12 inadvertent assent. We think that unlike e-sign and
13 unlike even the companion product in the conference,
14 UNITA, there is very little guidance and very little
15 protections in the context of inadvertent assent, and
16 we think we made very substantial improvements and
17 expansion in that regard.

18 Let me start off by pointing out that there are
19 three -- at least four standards or hurdles you have to
20 go through when you're in this faceless environment.
21 First, you have to show that there's an intent to sign,
22 an intent to authenticate, and the burden of persuasion
23 is upon the party who is trying to enforce that, and
24 that means that simply because I may have put in some
25 kind of symbol, there has to also be a clear showing by

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 burden of persuasion that, in fact, there was an intent
2 to authenticate, hurdle one.

3 Hurdle two, if I click, I agree. There has to
4 be intentional conduct for that to occur. And again,
5 the burden of persuasion is upon the party who is
6 trying to establish the contract. We do provide that
7 there is a way in which you can give -- have a
8 presumption, and that is that if first it comes up,
9 here is the agreement, I click through it, and then it
10 says "I agree," I have a nervous hand in my old age, I
11 click "I agree" really not intending to say that.

12 A second screen comes up, and the second screen
13 says, "You have just entered into an agreement. Would
14 you like to read the terms? You can click here to read
15 the terms. If you want to confirm your agreement to
16 purchase software at such and such a price, please say
17 yes, or if not, no."

18 If you had that second confirmation, then it's
19 pretty clear that it wasn't a nervous twitch. It was,
20 in fact, an intentional engagement in conduct that
21 would infer that I am agreeing to the contract.

22 The third thing that UCITA does that we think
23 is an improvement in connection with assent is that
24 there must be an opportunity -- a clear, reasonable
25 opportunity to read the contract before I have become

1 bound. That means whether I paid or did not pay in
2 advance, until I have an opportunity to actually review
3 the terms, I do not have a contract under UCITA.

4 The fourth element is that if I -- under 208,
5 and Bill Ashworth mentioned this the other day, under
6 208, if I do not have notice that later terms are
7 coming, then under UCITA, those later terms, whether
8 they're in the box or on the disk, are treated as a
9 proposed modification to the contract and which can be
10 accepted or rejected, and the original terms, whatever
11 they may be, are the ones that govern the contract.

12 So, parties are very clearly under the
13 obligation under UCITA to give notice that later terms
14 are coming if, in fact, they're not put up front. This
15 gives a very strong economic incentive to put them up
16 front if the pattern and the nature of the distribution
17 is one which enables you to put the terms up front.
18 There are certain circumstances, and Carol mentioned
19 them, when that would be very difficult or impossible
20 to do, and therefore, the flexibility is provided, but
21 adds some risk if you don't give that notice.

22 The last thing I'll mention, and I would like
23 to comment on everything that has been said, and I
24 think you can assume that I do have some responses,
25 even though I'm not going to get to them. The fourth

1 thing that you need in connection with assent under
2 UCITA is attribution; that is, how do you know that, in
3 fact, the anonymous person in the airplane is really
4 the person who is going to be bound by the agreement?
5 And under that, there must be a security device or
6 system under UCITA that is efficacious and commercially
7 reasonable in order to establish that I, Connie Ring,
8 on behalf of Atlantic Research, in fact, have authority
9 to bind Atlantic Research to the contract which I made
10 in the airplane on the license while I was flying over
11 either State X or State Y.

12 Obviously there are going to be differences of
13 opinion in connection with a new law. At some point
14 you have to start. You start and you have to start
15 putting some provisions on the table. We think we have
16 done a reasonably decent job. This is a human product.
17 What human product do you know of that is perfect? We
18 are not perfect. We've worked very hard. We came up
19 with what we think in toto is a very good product that
20 has many excellent features and which should be given
21 serious and thoughtful consideration.

22 MS. HARRINGTON: Thank you, Connie.

23 As we turn finally to Adam Cohn from Sun
24 Microsystems, let me ask you a question, and let me
25 remind you that our paralegals will pick up your

1 question form or give you one to fill out if you have a
2 question for any of the panelists or for all of them,
3 and questions that we don't get to here are going to be
4 posted, and we hope to get written responses from
5 panelists and also have some kind of ongoing sort of
6 chat room type discussion. We have to set that up.
7 So, it may take a little while for that part to be in
8 action.

9 But let me ask you a question, Connie, about
10 this example of the purchase consummated via the
11 internet from an airplane. How is this different from
12 a telephone purchase that's made from an airplane?
13 What evidence is there that current law is inadequate
14 to handle these kinds of situations? And ultimately,
15 is it your contention that the growth of e-commerce has
16 been impeded by the lack of UCITA and a UCITA type
17 framework?

18 MR. RING: There are really two questions
19 there. Obviously many of the elements of telephonic
20 communication are also there. My experience in dealing
21 with L. L. Bean is that very frequently they will
22 indicate to you that your message is being recorded,
23 and therefore, they have evidence that, in fact, it's
24 your voice, and if they get into litigation, they, in
25 fact, can play the tape and identify whether or not it

1 was my voice that was over the telephone.

2 There are other security devices and encryption
3 that really have to be done in connection with
4 attribution in connection with software, and that is
5 part of the reason for requiring a commercially
6 reasonable standard for those and giving the
7 flexibility of that to evolve and develop as the
8 industry moves along.

9 Secondly, it's hard to give you any specific
10 statistical information, although I can tell you that
11 among many businesses that have been before us, they
12 strongly believe that there is an impediment to the
13 growth of the industry, although this isn't quite on
14 point, because it isn't always in connection with
15 information products. I can tell you that my wife was
16 scared to death to do business over the internet in
17 e-commerce and buying goods for various reasons, and
18 part of it is related to the uncertainty of what are
19 the consequences of her giving out, for example, credit
20 card information over the internet.

21 MS. HARRINGTON: Steve, a very quick comment on
22 that, and then I am going to go to another question.

23 MR. CHOW: Just a quick comment on the airplane
24 analogy. The technology certainly exists today to
25 identify where a message came from and where a message

1 is going to if that were important. I think up to now
2 that has not been an issue, that these -- just think
3 about your faxes. You may put your originating fax
4 return message on. If there are requirements for this
5 sort of thing, then it will be an issue, but there has
6 not been a market breakdown that's required any of
7 this.

8 MS. HARRINGTON: Adam, are we set?

9 MR. COHN: I think we're set, yes.

10 MS. HARRINGTON: Certainly we would like to
11 stop and look at the Golden Gate Bridge for a moment.

12 MR. COHN: It's even nicer in real life.

13 Well, first of all, I want to thank the FTC
14 staff for inviting me back. I'm very glad to be here.
15 I have certainly learned a lot in the last day and this
16 morning. I actually listened with great interest and a
17 little bit of -- well, actually a lot of concern
18 hearing about how the matter was considered in
19 Maryland, because I found it very surprising that it
20 sounded like the Maryland Legislature assumed the
21 conclusion that licenses dropped in the box were
22 binding in other contexts, which I don't really believe
23 to be the case, and if that's the premise from which
24 Maryland started, I think that's kind of a weak
25 starting point.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 I also found it very interesting to hear that
2 the Maryland Legislature spent a great deal of effort,
3 it sounds like, and a lot of brain power on the issue
4 of fair use and what the proper level of IP protection
5 for different software is and how to balance the needs
6 of consumers' need to use IP, intellectual property,
7 and versus the rights that authors of intellectual
8 property have. I found that interesting because the
9 Constitution says that that's a Federal Government
10 issue, and it's interesting that UCITA seems to be
11 bringing that to the states.

12 I just --

13 MS. HARRINGTON: Well, there are a couple of
14 subtle points launching your presentation, Adam.

15 MR. COHN: Well, I want to start by asking the
16 general question, you hear this all the time, do we
17 need a new law or not? The common response you'll hear
18 is, well, we have a new economy, so of course we need
19 new laws. You can't sell word processing programs
20 using the same -- or databases using the same laws we
21 use to sell toasters. This is the information age, you
22 know, get with it, of course we need new law. That
23 doesn't really answer the question for me.

24 I want to know why a new law. Why isn't it
25 okay for a law that applies to toasters -- why can't

1 you apply that to a database or to anything else?
2 After all, information has been around for a long time.
3 Books have been for sale for centuries. We had
4 telephone, telegraph, I mean, these are all old
5 technologies. Why is it -- and we know that there is a
6 new economy now, I'm not denying that, but what is it
7 about the new economy? It's not information. I argue
8 that it's technology that's different.

9 The new economy is different because of
10 technology, not because of information. The
11 technological revolution that drives the new economy is
12 I think twofold. One is digital. You hear a lot about
13 how easy it is to make copies today of information.
14 That's one of the major differences in why people feel
15 that there's a need for a new law, a very good point.
16 You can make an enormous if not an infinite copy of --
17 a number of perfect copies.

18 There is also the network revolution, you have
19 the internet, which basically makes it possible to
20 share those copies with the entire world
21 instantaneously at very low cost. So, in other words,
22 there have always been information transactions. When
23 you hear UCITA, Uniform Computer Information
24 Transaction Act, it's not about information
25 transactions; it's about the fact that they're digital

1 and they're over a global network that really makes it
2 a new economy.

3 What problems does this technology bring that
4 might require a new law? Well, you hear the same ones
5 over and over again, and I think these are both very
6 good points. Problems with the first sale doctrine,
7 what happens if you sell a copy of software or some
8 service to a consumer, an individual consumer, for \$1,
9 and then you want to sell that same piece of software,
10 that same IP, to a company where 20,000 employees are
11 going to use it and you want to charge the company
12 \$20,000 for the same copy?

13 What happens if the individual sells her or his
14 copy to the company? Well, the software vendor really
15 has a problem there, and licenses are one way that have
16 been -- or UCITA is one way to fix that problem.

17 Another problem that you hear all the time is
18 the database issue, not protected by copyright law.
19 ProCD case is a very stark case, obviously very
20 favorable case to the company that was making the
21 database. It would be horribly unfair to let someone
22 put so much effort into a database and not give them
23 some opportunity to protect it. So, the conclusion
24 that people reach is that you need UCITA.

25 Well, another issue that the global networked

1 economy of digital sharing of information brings up is
2 the choice of law/choice of forum issue. You know, if
3 you have one small company in, you know, Lubbock, Texas
4 selling software and they put it out on the web, to
5 what extent are they going to be called into court all
6 around the country? I mean, these are very important
7 issues that need to be dealt with. UCITA deals with it
8 by basically giving the software vendor the right to
9 choose those unilaterally.

10 I think UCITA is an unbalanced solution to
11 these legitimate problems. Each computer information
12 transaction under UCITA comes with its own miniature
13 law, the license. Reacting to a gap in the
14 intellectual property law, the gaps that I pointed out,
15 UCITA replaces that law with a license. UCITA solves
16 the so-called choice of law problem with a
17 revolutionary approach by just supplying its own law.
18 Don't worry if you have to apply Texas law or Maryland
19 law or any other law. Just look at the license. It's
20 attached to the product itself.

21 I want to go into -- I'm going to just -- I'm
22 going to go into each of these in more detail, so
23 rather than run down it here, I have the top six myths
24 about UCITA that if you have been involved in the
25 debate you hear over and over again.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Myth number one, and I think this is probably
2 the biggest one, UCITA is about freedom of choice and
3 freedom of contract. The corollary to this is that you
4 always hear opponents of UCITA want the government to
5 restrict your freedom of choice and your freedom of
6 contract, and the government has to be there to protect
7 you from yourself, from your own choices.

8 Well, UCITA is not contract law. If it were
9 contract law, we would not be here. It abandons -- in
10 the mass marketing provisions, at least, it abandons
11 the core concepts of contracts, meeting of the minds.
12 If anyone was here yesterday, one of the panelists said
13 -- pro-UCITA panelists said, you know, if -- well, if
14 you think that contract means a meeting of the minds,
15 well, then, UCITA will present a problem for you. I
16 think that it means meeting of the minds and UCITA
17 presents a problem for me.

18 Under UCITA, you can agree to something you
19 didn't read. So, you hear all the time, well, if the
20 consumer agreed to it -- well, that's not "agree" in
21 the way that consumers think that that means. It's a
22 UCITA agree. It's conspicuously disclosed if it's in
23 all capital letters and in a contrasting text. It can
24 be a thousand page license. Under UCITA, you can
25 supply an infinite number of terms, and, you know, one

1 of those terms can be capitalized in the middle there,
2 and that's conspicuous according to UCITA, and, you
3 know, I have here -- I don't know if you can read that,
4 but it says -- it's in capital letters, so it is
5 conspicuous, whether or not you can read it or -- but
6 by failing to clap at the end of this presentation, you
7 agree to a hundred dollars to me. So, those of you who
8 believe in UCITA's premise, you can send a hundred
9 dollars.

10 Another myth is UCITA merely reflects
11 development of current law and brings uniformity and
12 clarity. I don't agree with that. UCITA does
13 accurately reflect the practices of certain segments of
14 the new economy, some software publishers. I do think
15 that that's accurate. I don't think it reflects the
16 law, because it leaves out 50 percent of the
17 transaction in the mass market context, at least, and
18 does not reflect consumer expectations.

19 Everybody involved in the process admits that
20 consumers ignore these. Nobody believes -- no
21 consumers really believe that, you know, that a large
22 software vendor can come in and do all the things that
23 it says in the license if they bother to read it.

24 I think that UCITA is a radical departure from
25 contract law, as I said, you know, I think it departs

1 from the concept of the meeting of the minds. First of
2 all, it's not uniform. It does not bring a uniform
3 law. Under UCITA, every single software application
4 comes with its own law with thousands of terms that
5 govern the warranty, limitations, arbitration
6 provisions, tort liability limitations, choice of law
7 and so on. I really would hate to be the owner of a
8 small business buying software, you know, off the shelf
9 or downloading it. Do you get your lawyer to come in
10 to install that or do you get your IT person? If UCITA
11 is passed, you better get your lawyer to do it, because
12 you have to agree to those terms.

13 And UCITA does not bring clarity. Read it for
14 yourself. And even a pro-UCITA panelist yesterday
15 said, "The meat of UCITA is in the comments," which
16 really baffles me. You would think that the meat would
17 be in the text, as Eileen asked that very question
18 earlier.

19 In the comments, as it was noted earlier, they
20 do contradict the text. I don't care that the comments
21 -- I think they put forth in many situations a
22 portrayal of what the text says that's not clear to me
23 on the face of the text.

24 I think that UCITA really hides the ball. What
25 we're really dealing with here are gaps in copyright

1 law and intellectual property law that leave software
2 vendors feeling exposed, perhaps legitimately so. I
3 think those issues should be debated on the merits and
4 not put forth as an issue of contract. UCITA basically
5 says let's not debate those issues. Let's not have the
6 government come in and decide what should be protected
7 and what shouldn't be protected. Let's just limit it
8 to freedom of contract. But as I noted before, freedom
9 of contract is not the issue.

10 Myth number three, UCITA protects consumers, we
11 have heard a lot about that. UCITA doesn't become
12 consumer friendly just because consumer group were
13 involved in the process, that it was ten years long,
14 that there were complex issues involve, and the
15 official comments say some positive things about
16 consumer protection.

17 Look at the text of UCITA and ask yourself,
18 what would really happen in the real world? Consumers
19 don't read these licenses, everybody admits, that's
20 unanimous. Lawyer -- everybody -- every lawyer in here
21 knows that you're going to stuff every possible
22 disclaimer you can into a license that no one's going
23 to read, because it's not going to affect sales,
24 because no one's going to read it. If these licenses
25 are enforceable against consumers in the mass market

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 context without presale disclosure, I think consumers
2 are in big trouble, but 105-B is here to save us.
3 That's the provision that's going to make sure that
4 nothing bad happens to consumers.

5 You hear from the people against UCITA saying,
6 well -- people supporting UCITA said, well, 105-B is
7 going to prevent these bad things. It's not going to
8 allow tort law to be preempted. It's not going to
9 allow fair use of consumers to be preempted. It's not
10 going to permit reverse-engineering and stifle the
11 internet economy and, you know, and so on and so forth.

12 Well, read the text of 105-B. I don't want to
13 spend too much time, but here it is, and essentially if
14 you read it carefully, even if a term is found to
15 violate a fundamental public policy, the Court does not
16 have to strike out that term. The Court has
17 discretion. They may refuse according to UCITA.

18 And the Court also has to make the judgment
19 that the interest in enforcement is clearly outweighed
20 by public policy. Even after they have made the
21 determination that it's a fundamental public policy, by
22 the way.

23 I think 105-B makes promises that are not
24 delivered. The official -- they always say look at the
25 official comments. Well, here are, you know, here's

1 the line that I think is the strongest in the official
2 comments that says that, you know, 105-B will protect
3 innovation and fair comment and fair use. It says,
4 "The offsetting public policies most likely to apply
5 are those regarding innovation."

6 Well, that's -- that doesn't really convince a
7 judge. I mean, it's not telling the judge what to do.
8 That would be the black letter, but the black letter
9 doesn't say anything about fair use. It doesn't
10 protect fair use, doesn't protect fair comment, doesn't
11 protect competition. It just says in the comments
12 judges will probably do this. I don't think that's
13 very convincing, but ask the obvious question, why
14 doesn't the text include these policies? The answer we
15 always hear is, well, you know, it's like the
16 Constitution, we want to get it general, not too
17 specific.

18 Well, a lot of laws have specific and general.
19 I mean, you can have both. If everyone has these very
20 strong concerns about it, I think some specific
21 provisions, such as protecting fair use, protecting
22 reverse engineering, need to be put in there.

23 Another myth is presale conspicuous disclosure
24 in terms is impractical. It can't be done. There are
25 too many terms. I always say, this really mystifies

1 me, because here we have an interactive technology,
2 that's the greatest advance in mass communication in
3 our lifetimes, you can interact with the mass audience.
4 I mean, it's incredible. Disclosure should be the
5 easiest it's ever been. I mean, you can really get an
6 understanding of the consumer -- you can get an
7 understanding over to the consumers.

8 The answer you hear is that there's too many
9 terms to disclose them conspicuously. So, even if you
10 use technology, you can't disclose them conspicuously.
11 You should always ask next, why are there so many
12 terms? I think the reason is because they are putting
13 terms in there that are not necessary or relevant to
14 the problems that are discussed, the multiple use
15 versus single use problem and the database protection
16 issue. Pretty simple, those are pretty
17 straightforward, you can fix those with a few terms.
18 You don't need to put stuff in there about tort
19 liability or anything else or speaking out on a
20 product.

21 I think the multiple use provisions are often,
22 and in many situations, I'm thinking in free software,
23 shareware, for example, that it's a red herring,
24 because no one really cares, I don't think, if you
25 don't disclose good things about the product. If

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 copyright law says that you can't make more than a
2 certain number of copies for fair use of this and the
3 license gives you more than that right, I don't think
4 any consumer group is going to get up in arms that
5 you're not disclosing that fact in advance, that you're
6 giving the world the right to copy your product an
7 infinite number of times. That's not the issue here.
8 It's always where you're taking away rights that are
9 otherwise granted by the background law.

10 Myth number five, this is a little bit wordy
11 here, you always hear that UCITA opponents are these
12 ivory tower, tree-hugging, big government academics
13 that don't understand the new economy. Well, you read
14 this, for example, in Ray Nimmer's comment to the FTC.
15 Some academics allege, as if it's some sort of, you
16 know, we're on trial, that software is within and
17 expected to be within Article 2, the sale of goods, but
18 this is a political position of persons who have
19 agendas other than those centered on facilitating an
20 economy that benefits all, including consumers.

21 That doesn't help me evaluate UCITA, and I hope
22 it doesn't help you. Sun Microsystems, who I have the
23 pleasure of working for, does not support UCITA. Sun
24 understands the new economy, and they don't support
25 UCITA. So, you should ask, you know, is it the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 tree-hugging, you know, liberal intellectuals that are
2 doing it or is it the practical people who understand
3 the new economy and don't want something locked in like
4 UCITA?

5 The other myth, final myth, is that there is no
6 other way to do this. Mass market licensing I think
7 was a stopgap measure really to fill in the gaps when
8 new technology came around. I think the best way to
9 fix the problem is to do something more permanent, more
10 in line with what we have always had in the past, not a
11 private intellectual property right.

12 Why fill in the gaps with giving software
13 vendors a unilateral right to draft their own copyright
14 law? If licensing is appropriate, on the other hand,
15 why not set some default terms in UCITA and then if you
16 have to depart from those default terms, give some
17 clear disclosure? It's very easy. Other laws take
18 that approach.

19 I think the last points that I want to make, in
20 considering UCITA, are that there are victims to the
21 UCITA mass market license other than the consumers that
22 click on these. The average consumer is not going to
23 care that they can't reverse engineer a product. So,
24 you might have, you know, 10 million people buy the
25 product. Four of those people, some of them who might

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 work at my company, care about reverse engineering
2 issues.

3 Well, you know, the market is not going to
4 solve -- those tens of millions of people who are
5 buying the product are not going to call the software
6 vendor and demand that they change the license to allow
7 reverse engineering. So, the market is effective, and
8 competition is stifled even if all the consumers know
9 from disclosure even on the outside of the box, for
10 instance, that their fair use rights and their reverse
11 engineering rights are impeded.

12 UCITA does not provide explicit protections for
13 reverse engineering. You hear all the time that it's
14 going to protect it, but it doesn't protect it. If
15 they really wanted to protect it, it's very easy to put
16 that in the text of UCITA. It's not in the text of
17 UCITA/, even after intense, intense pressure and
18 debate, it's not there, and you have to ask why. I
19 think it really raises some red flags.

20 Finally, I think you have to worry about
21 locking in the future. I mean, this was a ten-year
22 process, and we have heard yesterday that UCITA itself
23 "transmorphed," if that's a word, over the time that it
24 was being written because the software market really
25 changed from an over-the-counter purchase of a disk to

1 something that you download over the internet.
2 Well, if UCITA wasn't workable in its first
3 incarnation because we now shifted to a new economy
4 where we're downloading stuff, why would we want to
5 lock into something that locks us into what we have
6 now? We don't know what the future is going to be. We
7 don't know whether people are going to be downloading
8 software every time, buying a computer with no software
9 on it, downloading it. Maybe they'll be buying
10 computers as appliances that will have all the software
11 installed already. We don't know what the future is
12 going to hold.

13 I think the current law is working very, very
14 well for most circumstances. There are a few gaps that
15 I pointed out, but, you know, we have a really good
16 economy, and we don't have UCITA, and there are big
17 companies that are not tree-hugging, you know,
18 intellectuals that are worried about what UCITA would
19 do and that it would hurt the economy, and, you know, I
20 think you have to really ask yourself whether or not
21 locking into what we see in the software world now,
22 among a few big vendors of software, is really the way
23 to go.

24 I mean, the internet is about openness and open
25 sharing of information. That's what's caused the boom,

1 that there's interoperability, there is the sharing of
2 information. That's what's caused the boom. You've
3 always had information. Do you really want to pass a
4 law that gives all of the incentive to the creator of
5 the intellectual property to give themselves rights
6 that are not provided in the copyright law?

7 The Constitution gives the Congress the duty of
8 balancing the rights, the needs of people to use and
9 share information versus the right of the intellectual
10 property owner. Courts have dealt with the fair use
11 issue for decades and balanced those issues out, and I
12 think those issues need to get reevaluated in a context
13 of digital economy, but let's not give unilateral power
14 to one side to determine what those rights are.

15 MS. HARRINGTON: Thank you, Adam.

16 Quick question for you. Are you speaking on
17 behalf of yourself or Sun today?

18 MR. COHN: I think we have another Sun person
19 in the audience, Lowell Sachs, who can probably answer
20 that better than I can, but I think it's safe to say
21 that Sun does not support UCITA. They have some strong
22 concerns especially with the reverse engineering. Sun
23 is in favor of open systems and does not follow the
24 model that is put forward in UCITA that is really a
25 proprietary, closed model to software, closed system.

1 Sun is a believer in open systems and has strong
2 concerns about it because of that.

3 I don't know how much of, you know, what else I
4 said would be endorsed by, you know, the chairman, but
5 I think it's safe to say he would probably agree with a
6 lot of it.

7 MS. HARRINGTON: Thank you.

8 Okay, a question -- here's what we are going to
9 do. Although there is a break built in during the next
10 15 minutes, we are going to make it sort of a private,
11 personal break. If you want to take a break, go ahead
12 and take a break, but we are going to use these 15
13 minutes for discussion among these panelists, okay?

14 MS. MAJOR: This panel is scheduled to 11:00.

15 MS. HARRINGTON: Well, the agenda is a little
16 confusing. It says the panel goes to 11:00, but it
17 also says there's a break from 10:45 to 11:00. So, I
18 am going to say, if you want to have a break, have a
19 break, but I want to hear more discussion from these
20 panelists. So, we are going to keep this rolling, and
21 here's a question for Professor Braucher and really
22 probably all of the panelists if you want to chime in.

23 Granted that UCITA allows sellers to take
24 advantage of consumers in a variety of ways, how big a
25 practical problem is this? In a competitive

1 environment, won't virtually all sellers behave
2 themselves and not exercise all of the powers that
3 UCITA grants them for fear of seeing their customers
4 take their business elsewhere?

5 MS. BRAUCHER: You know, this is a very
6 interesting argument to me. I teach contracts from a
7 law in action perspective, and I make this point all
8 the time, that business reputation is the most
9 important factor in relationships between businesses
10 and between businesses and nonbusiness customers, but
11 that doesn't mean that contracts don't matter at all.

12 I mean, is that what the point of the question
13 is, that -- they matter at the margin. They matter
14 when for some reason the relationship no longer matters
15 to one party. You know, you don't start litigating
16 unless the relationship has broken down, and that's the
17 point at which you need to rely upon legal rights.

18 So, I mean, I don't know, is the point of this
19 that we would have a regime of no contracts and
20 everything would just depend on business reputation?
21 It's an interesting proposal.

22 MR. BARVE: Let me just say that in the State
23 of Maryland, the attitude we take is that we want
24 strong consumer laws to supplement a competitive
25 market, and that's the way we wrote our law, which by

1 the way specifically mentions that a term is
2 unenforceable after weighing fundamental public
3 policies, including fundamental public policies
4 concerning competition and innovation, which I will
5 admit did not go far enough for the opponents of the
6 bill, but it went far enough for us.

7 MS. HARRINGTON: Steve and then Adam?

8 MR. CHOW: Okay, I think a lot of this was
9 addressed yesterday in terms of if you have competition
10 and if you have at least some critical mass of consumer
11 involvement in information, then you can have
12 whistle-blowers and other people come out and allow
13 market forces to work, and I think one of my problems
14 with UCITA is that it doesn't promote that, and if I'm
15 counseling my client from the software vendor side, I
16 would not counsel disclosure. The incentive is not to
17 disclose.

18 Most of my small software developers typically
19 just copy other people's shrinkwrap licenses, not
20 believing they are enforceable, but they copy them
21 because they figure someone else spent hundreds of
22 thousands of dollars in attorneys' fees to do it, so we
23 get to the least common denominator, just sink right to
24 the bottom.

25 MS. HARRINGTON: Also Connie wanted to say

1 something on this point, so Adam and then Connie.

2 MR. COHN: So, I guess the question was, you
3 know, about whether market forces would solve the
4 problem, and I guess the point that I would want to
5 make is that, you know, a lot of the people that are
6 injured by this are not in the market. As I made the
7 point just a few minutes ago, that people in favor of
8 reverse engineering are not going to have enough market
9 power to tell the mass market, you know, you have got
10 to negotiate for -- or you have got to, you know, harm
11 the reputation of this company until they open up their
12 software license to allow that fair use.

13 MR. RING: I mentioned that I was general
14 counsel for Atlantic Research Corporation, a
15 significant defense contractor but also in the market
16 for developing air bags, and so we're in commercial
17 markets, as well.

18 Our reputation was extremely important, and I
19 can tell you that the top management all the way down
20 through the the legal staff was very sensitive to
21 writing fair contracts, because we are going to be
22 judged on that basis, and our long-term ability to
23 compete in the -- both the governmental and the
24 commercial market depends upon our satisfying our
25 customers, whether they're government kinds of

1 customers or others.

2 That doesn't mean, however, Jean, that the
3 contract is unimportant; quite to the contrary. The
4 contract is important, and generally well-managed
5 companies that want to maintain their reputation are
6 going to generally include fair terms within their
7 contracts simply because it's good business. That
8 doesn't mean that you are not going to have some
9 renegades out there that are putting out terms that are
10 inappropriate.

11 That's part of the reason for including such
12 standards as good faith and the enforcement of
13 provisions and in the definition of good faith, fair
14 dealing. Fair dealing is a very comprehensive term.
15 Unconscionability is another safeguard. Fundamental
16 public policy is another.

17 Jean is quite correct in saying that
18 "fundamental" was inserted, and if you read the
19 comments, which were written I believe by your father,
20 they -- because he was the reporter for that, the word
21 "fundamental" is used in the official comments, because
22 basically what you are looking at is the weighing of
23 competing policies.

24 Let me give you free speech and privacy, two
25 important fundamental public policies, and a particular

1 term may raise a concern about privacy and may raise a
2 concern about free speech, and I've got to weigh those
3 two fundamental policies against one another to decide
4 which one of them I am going to follow, and therefore,
5 the language of the restatement does use the weighing
6 standard and is an exact quote from that.

7 In connection with reverse engineering, the
8 official comments say that as a matter of fundamental
9 policy, reverse engineering in certain circumstances
10 may well be fundamental public policy that is
11 important, particularly in connection with
12 interoperability, but let me give you again a personal
13 experience.

14 We license, Atlantic Research, licenses its
15 technology to suppliers. We don't want that supplier
16 then competing with us in terms of supplying that same
17 part to others, and so we put in a restriction, that
18 our trade secrets, and licensees of patents,
19 occasionally may include copyrighted material, but
20 usually first use in our business, we put a restriction
21 on reverse engineering, and I think under the
22 circumstances that's quite appropriate, because the
23 confidentiality of dealing with that particular
24 supplier is that they are going to supply us and they
25 are not going to supply our competitors.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 MS. HARRINGTON: But that circumstance isn't a
2 mass market license.

3 MR. RING: The mass market license is one where
4 we say in the comments where you do not have the same
5 relationship between the two, then the fundamental
6 policy which may go against the contract term is to be
7 given more consideration. In that regard, I should say
8 that the comment was very carefully worked over and
9 approved specifically by Professor Pearlman as being an
10 appropriate articulation of what we were gathering, and
11 drafts went back and forth.

12 Now, Professor Pearlman is not an advocate of
13 UCITA, and I would disclose that, but on this
14 particular matter, we very carefully crafted the
15 language, and much of the language is actually
16 Professor Pearlman's language.

17 MS. HARRINGTON: Jean?

18 MS. BRAUCHER: Yeah, a couple of quick points.

19 It occurs to me on the original question that
20 the argument here is essentially like saying if we
21 flipped it around from the consumer perspective, most
22 consumers pay their bills because they want credit in
23 the future. Therefore, we don't need enforcement of
24 the payment obligation. I mean, that's the gist of the
25 argument but flipped around.

1 The second point about the fundamental public
2 policy provision, you've still got the weighing
3 language in there, and then you load on, you know, you
4 weigh -- and Adam put that language up -- you weigh the
5 fundamental public policy against the interest of
6 enforcing. So, you have got the weighing test, and
7 then you have added on a word to sort of suggest
8 that --

9 MR. RING: The weighing is, again --

10 MS. BRAUCHER: -- the weighing is in the
11 restatement; the fundamental is not. The second --

12 MR. RING: Well, the weighing of enforcement
13 must be considered.

14 MS. BRAUCHER: The third point is -- well, I'm
15 glad to see in the legislative note in 105, and I have
16 to say I did miss that language in the September 29
17 draft, I guess that's when that went in about the
18 Unfair and Deceptive Practices Act, and I'm glad to see
19 that. I wish when the new revisions of UCITA came out
20 you redlined them, then we'd catch the good things you
21 put in, and I keep asking the NCCUSL office to do that,
22 because it's a 90-page statute, and they keep coming
23 out with new versions. It's supposed to be done, but
24 they keep coming out with new versions.

25 The final point, I thought maybe there was

1 another good thing I had missed, and I just went back
2 to check UCITA, and that's on this business of you have
3 to give notice that terms are coming if you are not
4 going to give them in advance. This is a very complex
5 area, but you need to track through 112, which starts
6 by saying, unfortunately, explicitly that you can keep
7 the terms back until after payment, but you have to
8 give the customer an opportunity to review, but we're
9 talking about an opportunity to review that comes after
10 you have already paid and taken delivery.

11 Then you go to Section 209, the mass market
12 assent provision, and it says that the customer can
13 adopt the terms before or during a party's initial use.
14 And then finally you go to 208, which you mentioned,
15 Connie, and that talks about adopting the terms after
16 beginning performance or use. So, the idea is not even
17 at the point where you first start to use but later you
18 could be adopting terms if there was reason to know the
19 terms would come that much later, and the reason to
20 know doesn't have to be by notice. I think the comment
21 suggests that prior transactions will give you reason
22 to know.

23 So, I put this all together. I wish there was
24 a requirement of notice if terms are coming later,
25 although I still don't think that's good enough, and I

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 talked about that yesterday, to just say that this is
2 license terms in the box. The question is, well, what
3 are the terms in the box? You know, how can you make a
4 meaningful choice?

5 Now, I think this idea that disclosure doesn't
6 matter at all that I heard from Delegate Barve --

7 MR. BARVE: Because people don't read it.

8 MS. BRAUCHER: Well, if people don't read it,
9 we need massive regulation of terms. We have got
10 market failure. The first line of intervention should
11 be make sure the terms are available so we can get
12 market competition going.

13 We had the professor yesterday from George
14 Mason talking about assumptions of knowledge and
15 competition. You need to have knowledge, you need to
16 have competition in order to have a working market. If
17 we don't have that, the FTC ought to be writing these
18 contracts, you know, disclosure is how you get a market
19 going.

20 MR. BARVE: Or you need really good consumer
21 protection laws.

22 MS. BRAUCHER: Well, that's what we're talking
23 about, consumer protection laws.

24 Now, I think some substantive regulation, what
25 you're saying is dictating terms the way Maryland has,

1 is not a bad solution for certain kinds of terms. That
2 is, a mandatory implied warranty of merchantability; a
3 mandatory prohibition on predispute arbitration, which
4 consumers can't understand; a mandatory set of terms
5 that says, you know, you have to have first sale
6 rights, fair use as a minimum. Those would be great
7 ideas. I'd love to see that.

8 But I'm saying, look, let's do the more
9 conservative thing and try to get a market going, not
10 impose a lot of substantive regulation first.

11 MS. HARRINGTON: All right, we are going to
12 have one last question, and I have to say that I have
13 been corrected. The agenda that I'm looking at is
14 apparently incorrect. The break is at 11:00. So, if
15 you have been having your own private break, you can
16 have a public break in a few minutes with everyone.

17 Last question, is the right to a return the
18 same as a right to a refund? The comment in Section
19 112 states that failure to provide a right to return
20 when required does not invalidate the agreement. How
21 then is a right to return really a right for consumers?

22 There's several questions in there, and I would
23 invite any of the panelists -- Connie, you first, Adam
24 then.

25 MR. RING: With respect to consumers, Section

1 209 is the applicable section, and it clearly provides
2 that if you get the terms after payment, then under
3 those circumstances you have to assent to those terms,
4 and if you don't assent to those terms, then you're
5 entitled to a cost-free refund, which is composed of
6 three elements, the return of the price, the return of
7 the incidental costs of returning it, and if you -- in
8 order to read the terms and review the terms, put it up
9 on your computer and it had any impact upon your
10 database, any restoration costs of restoring your
11 system is included in that cost-free refund.

12 Again, this was put in to make it very clear
13 that in a consumer context and a mass market context
14 that if it is in any way possible to disclose the terms
15 in advance that you will have a strong economic
16 incentive to do that.

17 Now, let me give you one instance where you
18 might have a legitimate business model, that's the
19 telephone illustration that you called. I call up a
20 discount house and say I want to order Windows 2000 and
21 I get a discount price on that particular disk, and
22 it's significant enough so that I want to do that. If
23 they had to disclose those up front, one of two things
24 would have to be done. Either they'd have to send the
25 terms to me so I could read them, or they would have to

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 read them over the telephone.

2 I'm not likely to ask for either one, because I
3 really would like Windows 2000. So, I'm better served
4 under the circumstances where I can get the disk at the
5 discount price, put it up and then read the terms, and
6 if I don't like the terms, I'd get a complete,
7 cost-free refund.

8 MS. HARRINGTON: Adam?

9 MR. COHN: I guess I'd just like to say two
10 things. One, I think that the right of return in my
11 opinion is a fiction, because as I was mentioning
12 earlier, I think that the thing driving the economy,
13 the new economy, is the fact that you have digital and
14 the fact that you can, you know, you can make copies
15 that are perfect, an infinite number, and that you can
16 distribute it worldwide instantly.

17 In that environment, if we're creating a law to
18 protect against those two things, does anyone really
19 think that a right of return makes sense? You have the
20 product on your computer, I mean, you have got it
21 already. They can't really ask you to return it,
22 because there is no "it." It's a -- it's the bits that
23 you've already copied and downloaded on your computer.

24 The CDROM can be -- how do you return something
25 that you downloaded off of a web page? You just send

1 them an affidavit that says you erased it from your
2 computer? I mean, maybe there's a technological fix
3 for that, maybe it's possible --

4 MS. BRAUCHER: There is.

5 MR. COHN: But the thing is that I think it's
6 sufficient, also, and maybe Jean wants to talk about
7 that, in the terms of UCITA itself. You don't really,
8 I believe under UCITA, don't really have the right of
9 return. You can get out of the right of return, don't
10 have to require that very, very easily. I think that's
11 fiction.

12 MS. HARRINGTON: Jean, we will give you a quick
13 last word on that.

14 MS. BRAUCHER: Well, you know, I understand
15 that Microsoft has had this for some time, and I'd like
16 to know how often it's been exercised. There was a
17 wonderful story that was put up on the web about
18 somebody who did try to exercise it, and it took them
19 about a month of correspondence, and ultimately they
20 said forget it, even though they had the term. So, I
21 think it was so surprising that anyone actually tried
22 to exercise it that this was the result that you got.

23 So, that's the sense in which it's meaningless,
24 that once somebody's already paid, got the software on
25 their machine, the idea that they're going to now say,

1 well, I'm going to take this back for a refund is just
2 -- it's not going to happen. It's -- it's -- I mean, I
3 compare this to the economics of bait and switch, you
4 know, that you get the terms later, finding out it's a
5 license rather than a sale. I mean, assuming people
6 understood that, they're now -- you know, to go try to
7 find some other set of terms, they have to take it
8 back, start over, not know until they got home again.

9 It's a terrible burden on shopping to say you
10 don't get the terms until after you've paid and gotten
11 the product. The point at which you want to shop is
12 before you pay, right, and on the web, it should be
13 easy to shop, to be able to go and look at terms for a
14 number of different products and decide this is the one
15 I want, but instead you have to order one, download it,
16 you know, after giving your credit card, upload it, try
17 to get a refund on your credit card. You know, it's
18 just no way to set up shopping.

19 MR. BARVE: Well, wait a minute, let's
20 distinguish a couple of issues here.

21 First of all, if want you to return a piece of
22 software because it doesn't work and you live in a
23 state that has an aggressive Attorney General like we
24 do, then you go to the Consumer Protection Division,
25 the Maryland Attorney General, and they go and kick

1 butt, and they do. And they have done a very good job
2 against AOL and others, and they have been effective.

3 MS. BRAUCHER: I am talking about terms, not
4 enforcement.

5 MR. BARVE: I had a public hearing last night
6 where I had 65 opponents against the intercounty
7 connector, so I am not going to be interrupted.

8 In any case, there is another issue, though,
9 and that is whether you object to the software because
10 of provisions in the license term as opposed to the
11 actual workability of the software.

12 Now, the workability issue is something that
13 you can handle with consumer laws and a good Consumer
14 Protection Division and, of course, that varies from
15 state to state, but with respect to -- let's say you
16 happen to be the 0.01 percent of consumers who reads
17 license terms because you don't like buying a software
18 package that has a nonreverse engineering provision in
19 it. Well, you know, that's a completely different set
20 of circumstances, and that's a set of circumstances
21 that have to be -- you know, the whole issue of whether
22 you have the right to return or -- we, at least in
23 Maryland, understood that there are two -- those are
24 two completely different circumstances under which a
25 person might want to return software.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 And -- oh, one other thing, the gentleman from
2 Sun Microsystems made a comment about federal law. We
3 in Maryland didn't wait for the Federal Government to
4 blow away preexisting condition limitations in 1993.
5 We don't feel we have to wait for the Federal
6 Government for anything if we have a better solution.

7 MS. HARRINGTON: Now, that is going to be the
8 last word, because Delegate Barve kept within my
9 initial ten-minute restriction request, and he wanted
10 to know what his prize was, and it is he gets the last
11 word, although we will be discussing the intercounty
12 connector for those of you who live in Montgomery
13 County.

14 We're going to take a break until 11:20, and
15 then we'll start up our last panel. I want to thank
16 each of these presenters for very, very excellent
17 presentations this morning. Thank you.

18 (Applause.)

19 (A brief recess was taken.)

20 MR. SALSBERG: As we sit in this room at the
21 FTC and we look out these windows, which unfortunately
22 the shades are drawn, we look out at the Capitol, it
23 seems appropriate to shift the focus of what we have
24 been talking about these last two days to what should
25 be the government's role in ensuring that markets for

1 high-tech products are efficient and fair to consumers.

2 To help us explore this issue, we are pleased
3 to be joined by two legal scholars. First on my right
4 is Larry Ribstein. He is a professor at George Mason
5 University Law School. He has authored dozens of
6 articles on a variety of legal issues and is the
7 co-editor of the Supreme Court Economic Review.

8 On my far right is David Rice. David Rice is a
9 professor at Roger Williams University School of Law.
10 He also has authored dozens of articles, including
11 articles concerning UCITA and proposed article 2-B of
12 the UCC.

13 We have asked Professors Ribstein and Rice to
14 give comments on this issue, and after their comments,
15 we will have a brief question and answer period, and
16 once again, we will be using the question and answer
17 format that we have used throughout this symposium. If
18 you have a question, just raise your hand and an FTC
19 staffer will hand you a card to write the question on
20 and it will be passed up to the front.

21 So, why don't we turn to Professor Ribstein.

22 MR. RIBSTEIN: Well, I thank the FTC for
23 inviting me today, and I'm here because I wrote some
24 articles with Bruce Kobayashi of my faculty and along
25 with some others on uniform laws in general, specific

1 uniform laws and choice of law, one of which was an
2 article on UCITA that was published in the George Mason
3 Law Review, and I have some general comments, as Mr.
4 Salzborg said about, the government's role here.

5 In general -- and my colleague Mr. Kobayashi
6 was here yesterday, and I don't want to repeat anything
7 he said, although I am going to refer to some of his
8 comments.

9 In general, we believe that the appropriate way
10 to get to regulation here is through state law, that we
11 can get efficient regulation through competition among
12 diverse state laws. I'm not going to talk about at
13 length any specific proposals here, including UCITA,
14 although I will be referring to UCITA.

15 In general, as my colleague Mr. Kobayashi said
16 yesterday, we agree with at least some of the approach
17 in UCITA in terms of enforcing shrinkwrap and clickwrap
18 contracts. We do think that consumers are able to
19 handle these kinds of dealings.

20 I want to correct something that I think Jean
21 Braucher said in the last session. We don't think that
22 every single consumer in the market is sophisticated
23 and informed. Our position is, and this is consistent
24 with the work of Schwartz and Willoughby and others,
25 that all you need is a fair number of sophisticated

1 consumers in the market. We don't have any conceptions
2 that all consumers are sophisticated and that all
3 consumers read every disclosure.

4 So, in general we believe that contracts work,
5 and to the extent that UCITA recognizes that, we
6 support UCITA; however, as I'm going to talk about in a
7 few minutes, I don't want that to be construed as an
8 unqualified endorsement of UCITA.

9 Now, the focus, as I said, of my comments is on
10 the government's role here and specifically on what
11 role state law can play. Now, there's been a couple of
12 I think broad criticisms of state law in this kind of
13 area, and I'll characterize those criticisms as what I
14 call the vacuum problem and the chaos problem.

15 The vacuum problem is that if you leave
16 regulation at the state law, you are going to have a
17 regulatory vacuum because state law will end up being a
18 race to the bottom, that lax regulation will rule and
19 people will be unprotected. There will be a regulatory
20 vacuum.

21 The chaos problem almost goes the other way,
22 which is that strong state regulation will apply far
23 beyond state borders. This is the problem that's been
24 often mentioned in the borderless internet and the
25 difficulty of state law regulators in that context.

1 So, you will have chaos.

2 You will have the State of Maryland, say,
3 regulating internet transactions all over -- regulating
4 internet transactions regardless of what law people
5 hope to be applied to just because there's some
6 tangential connection with the State of Maryland. I am
7 going to address those problems with state law as I go
8 through my remarks.

9 First of all, about UCITA, now, a lot of my
10 writings and my writings with Professor Kobayashi have
11 been critical of the products of the National
12 Conference of Commissioners on Uniform State Laws, and
13 I certainly am not appearing here today as an advocate
14 of NCCUSL products, and in fact, I think a lot of the
15 criticisms that I've heard of UCITA match what our
16 general theory would predict would be problems with a
17 NCCUSL-created law, that basically it's a compromise
18 process. It attempts to mesh all kinds of point view
19 -- points of view into a single hole. So, what you get
20 when you get something like UCITA, if you put Adam
21 Cohn, Jean Braucher, Connie Ring and all of that, you
22 put them almost into a blender, and the result is the
23 final act. Some of the problems have to do with the
24 problem that was discussed in the last session of the
25 law being in comments rather than in text. That's part

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 of the compromise process.

2 But in any event, I want to point out that
3 UCITA is not a uniform law. I mean, I'm sure this is
4 obvious, but maybe it deserves some emphasis. It's
5 been adopted so far in two states, and it's only
6 effective in one, and even in that one state, Maryland,
7 there was discussion in the last session that, in fact,
8 Maryland made some significant changes to UCITA, and
9 one would expect that as UCITA gets floated around the
10 United States that changes will be made.

11 I would say at most UCITA's going to end up as
12 a kind of template for state laws that are then changed
13 as much as you would change, say, a word processing
14 template. Maybe a few provisions would remain as
15 uniform, but I would think that it's extremely unlikely
16 based on Professor Kobayashi's and my survey of the
17 adoption history of uniform laws in general, it's
18 extremely unlikely that UCITA will be adopted widely,
19 that the widely adopted laws are laws of the Uniform
20 Commercial Code in general, with a few additions to
21 that, and UCITA I think lost a lot of adoption
22 potential when it was dropped off the UCC project.

23 So, in general, state law is a process here.
24 State law is not UCITA. State law is a process in
25 which UCITA will play some kind of marginal role. So,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 one alternative here is federal law. You know, I've
2 mentioned the problems of chaos and vacuums of state
3 law. I've mentioned that UCITA is not going to solve
4 these problems, it's not going to be adopted uniformly.
5 So, one logical alternative is some sort of federal
6 regulation.

7 And I don't want to -- I don't think I need to
8 reiterate but I want to mention or at least refer to
9 some of the comments that were made in the last hour
10 about the problems of locking in existing technologies,
11 that there are all kinds of technologies on the
12 horizon. How do we know what the world's going to look
13 like in the future?

14 Federal law would, in fact, achieve uniformity.
15 It would get rid of any chaos of state law that might
16 exist, but it's going to lock in the present. And I
17 know you've heard references, for instance, to the open
18 source problem. Well, I suppose that right now any
19 federal law that's passed could deal with the open
20 source problem, but how do we know that some other
21 developments, and Adam Cohn referred to this in the
22 last session, how do we know that there are not other
23 developments lurking on the horizon that could not be
24 dealt with in a federal law and that, in fact, would be
25 prevented by any federal law that locks in the current

1 technological system?

2 So, we think there's a better way, and that way
3 is by enforcing choice of law and choice of forum
4 agreements, and I know that this position has been
5 vilified before, and I want to try to defend it as well
6 as I can.

7 Focusing specifically on certain law
8 provisions, look at Sections 109 and 110 of UCITA, and
9 I would say that we do not endorse the limitations that
10 are in Section 109. In other words, we don't think
11 that Section 109 of UCITA goes far enough in enforcing
12 contractual choice of law, because it's subject to any
13 mandatory provision of state law, and therefore, you
14 could at best in a contract to simply choose
15 contractual provisions. We think that you ought to be
16 able to choose a state and including the entire
17 regulatory structure of that state, including mandatory
18 laws that override, and then whatever other rules would
19 be supplied by the default choice of law rules.

20 However, we would agree more strongly with the
21 approach in Section 110 of UCITA referring to
22 contractual choice of forum, and I know that there were
23 some negative comments about Section 110 in the last
24 session. I want to point out that although the Supreme
25 Court's efforts in this area might be shunted off to a

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 little corner of admiralty law, the fact is that the
2 Supreme Court has consistently in many different
3 respects and whenever it can endorsed contractual
4 choice of forum, even in cases where say the contract
5 was on the back of a cruise ticket or heavily regulated
6 areas where we're talking about arbitration under the
7 securities laws or under the discrimination laws, labor
8 laws. So, there is quite broad recognition of
9 contractual choice of forum.

10 We believe that's appropriate, especially in
11 internet law, where you are going to have problems
12 about remote forum no matter what you do because of the
13 national and international scope of the law and
14 transactions in this area, and so choice of forum is
15 important just to kind of organize what forum is going
16 to apply.

17 Now, I referred to the vacuum problem, and here
18 I want to address the problems of state law that I
19 referred to a couple minutes ago and how they will be
20 worked out under a contractual choice of law/
21 contractual choice of forum regime. And again, I
22 referred to the vacuum problem, the regulatory laxity
23 that you might get from a race to the bottom, and this
24 kind of gets back to a point that I made towards the
25 beginning, that consumers as a whole are not the

1 helpless dupes that I think are characterized in some
2 of the comments and some of the literature that I've
3 read.

4 Again, the point is not that every single
5 consumer is going to open up a license and read the
6 fine print and understand it but that we have a very
7 active market out there, especially in the internet
8 context, of information, of consumer interaction and so
9 forth. There are many mechanisms by which
10 sophisticated consumers can make information available.
11 There are magazines that are posted on the internet.
12 There is Davis Publications. There is a lot of sources
13 of information that consumers have where they can be
14 alerted to specific problems that might arise in
15 designations of excessively lax regimes.

16 So, if we start seeing, for instance, the
17 designations of Alaska law in contracts and it turns
18 out that Alaska law says that consumers have absolutely
19 no rights and vendors have all rights, I would suggest
20 that that's the kind of detail -- that's more than just
21 the detail, but it's the sort of thing that's going to
22 be widely broadcast and will come to the attention of
23 even passive consumers.

24 I know in researching myself on the internet, I
25 have -- and researching products, I've seen far more

1 obscure details of products that get far more play, get
2 a lot of play than -- of the sort that I think
3 contractual designation of lax regime would get. We
4 heard some talk in the last session about the role of
5 vendor reputation, and vendor reputation has been an
6 important aspect, a very important aspect in building
7 markets on the internet. Do vendors want to get the
8 reputation of designating lax regimes in their
9 contracts? I don't think so. And I think reputational
10 incentives are very important.

11 This is not a case of, well, if we have
12 reputation, therefore, we don't need contracts. This
13 is if we have -- as long as we have vendor reputations,
14 we don't need regulation beyond contracts. So, this --
15 I think there's a -- it's important to distinguish
16 between those two concepts.

17 Okay, another factor I think that cuts down on
18 what I've been referring to as the vacuum problem here,
19 that is, the problem of excessively lax regulation, is
20 the fact that a contract for choice of law is not like
21 any other kind of contract provision. Any other kind
22 of contract provision, say one of those myriad
23 provisions in a detailed license, the vendors are
24 choosing from an infinity of possible terms out there,
25 but all we're advocating is that vendors be able to

1 choose from one of the 51 U.S. jurisdictions.
2 We don't right now have a proposal on the table
3 that they be able to choose any law that's out there.
4 I have seen bizarre suggestions made that may deserve
5 to be on the table at some point, but you could start
6 an oil drilling platform somewhere, and, of course,
7 people have tried to do this, and designate the law of
8 that jurisdiction. Okay, maybe that's out there in the
9 future, but right now we're talking about being
10 comfortable with our 51 states, all operating under the
11 U.S. Constitution and all operating under U.S. federal
12 law.

13 We're just talking about designating one of
14 those states. Each of those states operates under
15 political structures. The politicians of all of those
16 states, the regulators of all of those states are
17 responsive to the citizens of those states, and I don't
18 think you're going to get remarkably stupid or vapid
19 laws from any of our states, and I think that's
20 something that prevents a vacuum, a regulatory vacuum
21 on the horizon.

22 Now, I referred to the chaos problem, and in
23 the choice of law area what that translates into is no
24 state is going to have the incentive to regulate in
25 this area because of the problem that whatever

1 regulation it comes up with, even if some companies
2 select that regulation in the contract, the regulation
3 is then going to be circumvented, because a consumer in
4 some remote jurisdiction is going to be able to have
5 that remote jurisdiction's law apply instead of the law
6 selected in the contract, and so therefore contractual
7 choice of law just won't matter; that again, consumers,
8 irrespective of the law designated in the contract,
9 they'll be subject to whatever their local law is,
10 which will override the law designated in the contract.

11 A couple of problems with that. One is I've
12 already referred to extensive enforcement of choice of
13 forum clauses. Courts recognize this, they understand
14 that the Supreme Court enforces this in cases where the
15 Supreme Court has jurisdiction, that choice of forum
16 clauses are widely applied, and choice of forum clause
17 is a way of getting the case tried in the state that
18 will enforce the contractual choice of law.

19 Another is that, you know, we have heard talk
20 about the borderless internet and about the chaos that
21 results when any state can exercise jurisdiction over
22 an internet transaction. That's simply not true. If
23 you look at the jurisdictional cases and commentaries,
24 there has to be some form of deliberative veiling of
25 the jurisdiction.

1 It's true that the law on jurisdiction over the
2 internet is in the process of being settled. There was
3 a lengthy article by the ABA Committee on Cyberspace
4 Law in the current issue of the Business Lawyer that
5 proposes I think some sensible limitations on
6 jurisdiction in cyberspace that would include limiting
7 it to, one, headquarter states; two, states where
8 internet vendors target consumers; and three, in
9 transactions that actually give rise to the
10 transaction, that that transaction be directed to a
11 state.

12 It talks about good faith efforts to exclude
13 transactions or prevent transactions from being made in
14 states and the relevance of those good faith efforts.
15 Obviously we have technologies that are being
16 developed, that can be developed, to block access or at
17 least make a good faith effort for vendors to block
18 access in remote jurisdictions. If you put all these
19 things together, that is, limitations on jurisdiction
20 and choice of forum clauses, and I think those things
21 make viable contractual choice of law, despite the
22 arguments that have been made about the borderless
23 internet.

24 And the fact is that what law is applied
25 depends to a significant extent on the jurisdiction

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 that a vendor deliberately avails itself of, has its
2 headquarters in, has significant operations in, those
3 things are going to matter, and states that want to
4 attract internet vendors are going to have an incentive
5 to have favorable laws.

6 Now, of course, one could make the race to the
7 bottom argument; that is that, oh, yeah, they'll have
8 laws that are favorable only for the vendors, not for
9 consumers, but that goes back to the point that I made
10 a couple of minutes ago that, again, consumers aren't
11 helpless. Even if it's true that each individual
12 consumer doesn't read every last detail in the license,
13 it's a sophisticated market on the whole. That's
14 referring back to comments that my partner Bruce
15 Kobayashi made yesterday.

16 So, what we're envisioning here is a law that's
17 provided by state competition rather than by the
18 competition of interest groups that basically -- I
19 guess it's a law that you could say where consumers
20 vote with their mouses or mice or whatever, the old
21 Tiebout Axiom about voting with your feet, but I think
22 we can see it coming where consumers vote on the law
23 with their mouse.

24 Now, there are those who would that say that
25 this business about having all these states with their

1 designated choice of law provisions is going to lead to
2 myriad standards, that what we really need is
3 uniformity and this is what UCITA provides us with, but
4 I want to point out that there's various different ways
5 to get standards and uniformity, and they don't all
6 have to be provided by a uniform law.

7 Now, one is that standard could be provided by
8 a single state, and I haven't mentioned corporate law
9 yet, but, of course, Delaware provides a standard in
10 corporate law, and there is always the possibility for
11 an internet Delaware to emerge, and I know that
12 Maryland and Virginia, at least, would like to have it
13 in their minds that maybe they would like to be in the
14 running for that position.

15 And also it's possible for a multi-state
16 uniformity to emerge but not necessarily by the actions
17 of NCCUSL. Mr. Kobayashi and I have studied the
18 process of spontaneous uniformity where uniformity
19 emerged even without a uniform law in the business
20 association area, and it's quite possible that that
21 could happen in the internet area. In fact, it's even
22 more likely, because the internet is a far more
23 effective coordinating device than anything that's
24 available with respect to business association law.

25 Now, what role is left then for federal law

1 under this scheme? Well, possibly some, I don't want
2 to omit all possible roles for federal law. I do want
3 to emphasize that I think it's very important to avoid
4 proposing locking in substantive standards at this
5 point, but federal law might shore up the enforcement
6 of contractual choice of law and choice of forum
7 clauses. If it's believed that notice is a problem
8 here, that is, notice of the selected law or surprise
9 provisions in the selected law, then perhaps some
10 regulation of notice of what the law selected is,
11 surprise provisions of that law.

12 I'm a little skeptical that surprise is a
13 problem here, because the worse that state law could do
14 is say that the contract is enforceable. The worst
15 from a consumer standpoint is to say that a contract is
16 enforceable, and that doesn't set up for me a
17 particular problem of surprise.

18 And then finally there are -- well, actually, a
19 third suggestion is possibly announce a hands-off
20 policy, that maybe one good result of this hearing is
21 that state law will be given a chance, and I think
22 possibly some of the -- one possible reason why we've
23 only seen two states jump into the fray so far is out
24 of fear that whatever they do is going to be overridden
25 by federal action, and that would be a good result of

1 this hearing in that we get a clear signal to the
2 contrary.

3 Finally, there are federal laws in many other
4 areas that don't specifically relate to the contracting
5 process. Obviously intellectual property law, and I'm
6 not commenting right now on all the possible provisions
7 that might be enacted there.

8 I'll stop at that point.

9 MR. SALSBURG: Thank you.

10 Professor Rice?

11 MR. RICE: I regret I wasn't able to be here
12 yesterday because I did have something to say about
13 warranties generally. I'm tempted to say a lot about
14 UCITA, because I generally do, but I will try and
15 simply make some tapestry to look at what I consider to
16 be possible roles of the government, particularly the
17 Federal Government, because I think that's what we're
18 here for, is to talk a little bit about what we think
19 the FTC ought to be thinking about, and maybe things
20 that they ought not go be thinking about, and I think
21 that we can learn some things, too.

22 We're dealing with contexts in which we have
23 computer software, information products. They are
24 numerous, growing, changing, changing in character,
25 changing in means of distribution and delivery.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 They're changing in that sense in responses to changes
2 in technology as well as to the marketplace. They
3 feature standard form contracts and standard form
4 terms, but that's true of 90 percent of the contracts
5 that are entered into in this country or more.

6 One of the things that's interesting is that
7 this market has not been stifled or held back to date
8 by the courts actually using UCCC Article 2 and lawyers
9 drafting contracts with UCC Article 2 and 2-A in mind,
10 and indeed many of the contracts that are well drafted
11 have Magnuson-Moss Act in mind.

12 These are sources that attorneys, courts, have
13 looked to today, and in some cases, particularly the
14 UCC, it's been applied directly, in some cases it's
15 perhaps a little bit less directly, even though not by
16 what we would call analogy, but I think in some cases
17 in particular there's some appreciation or sensitivity
18 to the fact that we have different subject matter, and
19 that's a common law like process.

20 Now, states function and make law in a lot of
21 different ways. Some of it's through the courts, some
22 of it's through the interpretation of statutes enacted
23 by the Legislature that are general in form, and I
24 think UCC has been quite a great success, and the
25 courts and legislatures I think have done something to

1 accomplish that. It's a public law like process even
2 though with a statutory underpinning.

3 Why change it? And I think that's probably
4 what Mr. Cohn was asking, you have to make the
5 affirmative case for change and particularly for
6 radical, extremely detailed, highly articulated rules
7 reinterpreted in extensive comments change before you
8 simply go down that road.

9 And for that reason I have had my reputation as
10 an opponent of UCITA or simply an opponent of UCITA as
11 it's been presented, and I think I've been miscast as
12 being an opponent of new law to respond to new
13 situations. That's very convenient, and it's also a
14 nice way to dismiss academics as tree-huggers, but
15 let's take a look at where this has come from.

16 Fifteen years ago -- and it's kind of a nice
17 convergence here, we talk about convergence these
18 days -- I published the first and only exclusively, in
19 terms of subject matter, article that's ever been
20 published on the Magnuson-Moss Act and consumers and
21 computer software in the first volume of The Computer
22 Lawyer. It's also the year I published an article
23 called "Product Quality and Laws and the Economics of
24 Federalism" in which using Tiebout and another type of
25 analysis looked at a whole range of different types of

1 laws that regulate consumer product quality, and
2 essentially reached the conclusion that by various
3 routes the states, in fact, reached a fairly common
4 place for most purposes, and there really wasn't too
5 much cross-subsidy between states due to differences in
6 their state laws.

7 So, maybe we ought to allow the UCC to continue
8 to develop and be applied and then look at what kinds
9 of things are the other realities in the marketplace
10 and what is the role of government in looking at those
11 realities? And this means I'm going to skip over a
12 great of what I was going to talk about, but not
13 entirely.

14 Beginning back in the 1960s, there were
15 proposals for regulation of consumer contracts, and
16 almost all of those proposals, including Truth in
17 Lending and Magnuson-Moss Warranty Act, started out as
18 proposals to mandate certain terms in a contract,
19 prohibit other terms in a contract, regulate the terms
20 in a contract, say if you're going to include them, you
21 can only do it in a certain way, and almost every one
22 of those statutes ended up being a disclosure statute,
23 and that's probably a process of political compromise
24 more than anything else.

25 But essentially what we said in all of those

1 statutes was at a bare minimum, consumers are entitled
2 to know the material terms of a contract before they
3 enter into the contract, and one of the things, of all
4 of the studies that were done, and they were done by
5 people in marketing research, advertising research,
6 consumer psychological research, said is timing is
7 all-important. The two things that are important are
8 timing and material.

9 You identify what is material, and it is
10 required disclosure only of that. You don't get into
11 "disclosuritis," which is why we have the Truth in
12 Lending Simplification Act. The judges interpreting
13 the Truth in Lending Act got into saying you have got
14 to disclose absolutely everything to the point that
15 now, again, Adam's example, you can have five pages of
16 all caps, and it's all, therefore, conspicuous and it's
17 all, therefore, not process, because there is nothing
18 that has a contrast or any kind of a distinction, okay?

19 So, you have to focus on what's material, and
20 I'm not here to say which term is material other than
21 to say I think that those terms related to the warranty
22 are material, and if I buy what Bob Donald Cravitz
23 writes, which is, in fact, a shadow of what Art Left
24 wrote back in 1970, saying contract as thing, Bob
25 Donald Cravitz said you aren't getting software or a

1 database, what you're getting is a license, then you
2 ought to be disclosing what that license is before
3 people make the choice to enter into it.

4 The bait and switch analog, if you get into it
5 and then have to opt your way and work your way back
6 out of it, is not possible, and the reason that we
7 prohibit bait and switch is to say you don't want to
8 take somebody down the road and then say, oh, yeah,
9 there's a fraud cause of action and you can litigate
10 that and that will take you five years and \$50,000, and
11 you can have the same thing under UCITA, you can do the
12 same thing, you can have the term declared
13 unconscionable, after five years and \$50,000 investment
14 in the litigation of the term in a piece of software
15 that you bought for \$100 or \$150, and you can do the
16 same thing about -- but it is not enforceable because
17 it's a violation of public policy.

18 All they have to do is say, no, it's not
19 unconscionable, sue me. No, it's not unenforceable
20 because it violates public policy, sue me. And that's,
21 of course, after you've entered into a contract, but
22 your point is what happens -- think about me going to
23 get something off the shelf, just for the usual
24 example. I look at packages, I look at everything
25 that's written on the outside, and I select one of

1 them, and I take it to the counter and I pay for it and
2 I walk out.

3 Now, why did I go to the store? Just for the
4 hell of it? Because I wanted a software package that
5 would do certain functional things for me or database,
6 okay. So, now I take it home, and I've consumed time,
7 I've made -- I've consumed mental process, I've put
8 money on the counter, and I get home, and what UCITA
9 tells me is now when you open up the package, you can
10 look at the terms, and if you don't like the terms, you
11 can take it back and get a refund and you can start all
12 over again.

13 This is what I call linear comparative
14 shopping. That isn't what consumer protection laws,
15 the focus on adequacy of information for the efficient
16 functioning of the marketplace, talk about, and that's
17 not what Alan Schwartz wanted to talk about either.

18 If you say standard forms are enforceable --
19 and you have to, it's a reality, you can't have the
20 modern marketplace without them -- then there has to be
21 an emphasis, at least, on those things that are still
22 there that deal with the freedom to contract or to not
23 contract, and that's the information about what the
24 contract is.

25 Otherwise, what we've done is we've basically

1 said, the drafters have freedom with contract, they can
2 do anything they want with it, and they know that
3 inertia, a number of other factors, the immediate sense
4 of having a product because I got it for the
5 satisfaction of a particular need, it's going to be
6 terribly burdensome for me to go through six of these
7 transactions to finally find a license that has the
8 terms that I like, I better just take it. They know
9 that's what happens.

10 And not just simply because people don't read
11 the terms, but even if Alan Schwartz picks out the
12 person who says this is the one who's going to read the
13 contract, who's going to read it when they get back
14 home, and then they are going to do a benefit-cost
15 analysis as to whether it's worth taking that contract
16 back to try and get a refund, and the Commission is
17 very concerned about benefit-cost analysis in terms of
18 thinking about how law works, including, I think, the
19 law of the contract.

20 The benefit-cost analysis can come out every
21 time, or almost every time, I'm not going to take it
22 become back. Hey, you know what happens when you take
23 it back? I'm on several list serves, as a matter of
24 fact, and it turns out that some of the lawyers who are
25 very intelligent people and who are very concerned

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 about some of the kinds of things about contracting and
2 copyright and other kinds of things of that sort, have
3 said, you know, I tried to take something back, and
4 this has happened several times, and they take it back
5 to the retailer, and the retailer says, oh, no, you
6 opened the box. I won't take that back for a refund.

7 Then what they try to do is to contact the
8 software distributor, and the software distributor ends
9 up being no different in terms of the difficulty of
10 getting a refund. How long are you going to keep your
11 money out there on that table and at the same time take
12 more money out of your pocket to say, okay, I am going
13 to go out and buy a competing product in the market
14 see what their license is like, and maybe I'll use
15 their product, maybe I won't, and this is absurd.

16 Now, what are we really trying to say? I'm not
17 saying that the FTC ought to be in the market and
18 regulate the terms of the contract. I think the
19 Magnuson-Moss Act can be interpreted in terms of the
20 off-the-shelf software products to apply. My comments
21 that I filed in writing on behalf of Net Action and
22 CPSR and CompuMentor cover that. I would have talked
23 about that yesterday; I'm not going to do it today.

24 The real point is the FTC is concerned with the
25 efficient functioning of the marketplace in two ways.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 One, making sure the consumers have that opportunity to
2 make an informed choice at the right time, at the
3 significant time; and second, that they have the terms
4 which are material available to them in that time and
5 manner in order to be able to do it, and this is not
6 simply to protect a bunch of tree-huggers. It's to
7 make the market work, it's to make competition happen,
8 it's to keep the market competitive instead of
9 everybody going into the hole of putting their terms in
10 the contract and saying, hey, it costs -- and this is
11 what I heard in the UCC 2-B meetings -- it will cost us
12 money to do that, and therefore, it can't be done.

13 The second part of it is in reality, we want to
14 be able to use everything on the outside of the box or
15 on the screen to be able to tell them how wonderful
16 this product is, what its specifications are and what
17 its performance characteristics are, and we want to be
18 able have them go inside to that contract that they
19 finally get and to have to click here and say, by the
20 way, the only thing that you have is an express
21 warranty that the medium on which this is recorded is
22 not defective, and in the event that it is, you may
23 return the whole thing for a refund. There are no
24 other express warranties, express or implied.

25 Now, what does that do? That's a cute piece.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 That says -- that statement qualifies as a Mag-Moss
2 1061 written warranty, and so long as a Mag-Moss 101 --
3 yeah, 1016 warranty says -- I'm flipping things around
4 -- you know, warranty is sufficient under the statute
5 and is adequately disclosed, you're inside Mag-Moss,
6 and one of the things you can do inside Mag-Moss is
7 except as state law would prohibit you from disclaiming
8 an implied warranty, you can disclaim everything else.

9 So, Mag-Moss right now, as it's being used in
10 those contracts, is being used to exclude
11 responsibility for product quality, for the product
12 that you really went to get, but you didn't go to get a
13 discount. You went to get a computer software program.
14 You went to get a database program.

15 It's a problem I think the FTC has to look at
16 in terms of how -- not whether Mag-Moss is being -- is
17 really applicable but, in fact, how the Mag-Moss model
18 is being used to say on the outside of the box, here
19 are all these wonderful things. This product can beat
20 the comparative terms, in comparison to its competing
21 products, this way, this way, this way, this way,
22 and once you get inside the box, that's all gone.
23 It doesn't exist. And they can't put on the
24 outside of the box something that sounds, perhaps, like
25 this:

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 The license agreement contained in this package
2 legally denies you any and all right to rely on or
3 treat as true any factual representation or
4 specification we have set forth on the outside of this
5 package. Common decency says if you're going to take
6 it away inside, tell them on the outside; common
7 decency, common sense. The essence of disclosure
8 law says the consumer ought to know at the right
9 time what it is that they're buying. It says you
10 ought to.

11 Now, I think the other piece in terms of simply
12 making a side comment on UCITA, I don't think we ought
13 to be getting into FTC regulating the terms of the
14 contract any more than we ought have state law
15 developed through NCCUSL essentially regulating the
16 terms of the contract in such a way that the defaults
17 are all set in one direction, and you have to litigate
18 your way out, which is absolutely cost-prohibitive, but
19 I think that the FTC ought to be looking not just at
20 the warranty terms but at other material terms and
21 saying the deception prevention mission of the
22 Commission and the competition promotion mission
23 of the Commission leads us to conclude that there
24 ought to be affirmative, timely disclosure of
25 selected material terms, and let the market then

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 compete.

2 MR. SALSBURG: Thank you. Thank you, both,
3 Professor Rice, Professor Ribstein. We are going to be
4 breaking for lunch now and reconvening at 1:15.

5 (Applause.)

6 (Whereupon, at 12:05 p.m., a lunch recess was
7 taken.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (1:15 p.m.)

3 MR. STEVENSON: Okay, why don't we get
4 started.

5 We are now looking on the international front.
6 The issues in this workshop that have been raised, a
7 couple of them overlap quite a bit with issues that
8 have been discussed in the area of international
9 consumer protection in a number of fora, both
10 domestically and internationally, in particular the
11 issues that were actually talked about in the last
12 panel, the pretransaction disclosure, choice of law in
13 a consumer contract, choice of forum, and we heard
14 about these issues in the previous panel, and here we
15 can think about how those same issues play out on the
16 international level, and they do I think as you'll see
17 in a number of ways.

18 Since we're talking about international things,
19 I nevertheless want to offer two American examples in
20 starting off about thinking about things international.
21 One is just to share with you a Dilbert comic that some
22 of you may be familiar with. Dilbert says to Dogbert,
23 "I didn't read all of the shrinkwrap license agreement
24 on my new software until after I opened it. Apparently
25 I agreed to spend the rest of my life as a towel boy in

1 Bill Gates' new mansion." And Dogbert says, "Call your
2 lawyer." And Dilbert says, "It's too late. He opened
3 the software yesterday."

4 I share that as an example. I don't want it to
5 be interpreted that Dilbert was on the UCITA drafting
6 committee at all, but I felt it was relevant to some of
7 the issues we've talked about here.

8 The second sort of example, hypothetical, I'll
9 use in thinking about this is a box of Cracker Jacks,
10 where you have the caramelized corn and then there's a
11 prize inside, you don't know what it is until you open
12 it, of course, or maybe the box says there's a prize
13 inside or terms may be included inside, and let's
14 suppose to vary the hypothetical that instead of a toy
15 it's a piece of paper that says that all interpretation
16 and enforcement of contractual disputes regarding this
17 product will be heard and decided in the courts of
18 Brussels in Belgium pursuant to Bulgarian law or in
19 Canada pursuant to Camaroon law or Austria pursuant to
20 Australian law or the Netherland-Antilles pursuant to
21 North Korean law.

22 Are those prospects appetizing to consumers,
23 and does it matter if the product is software instead
24 of sweets and does it matter if the software is
25 delivered over the internet as opposed to in a box?

1 Well, with that to start, we turn to our first
2 speaker, Susan Grant from the National Consumers
3 League. Susan has, I should note, also participated
4 both in the Trans-Atlantic Consumer Dialogue, along
5 with other U.S. and European organizations, and has
6 also participated in a number of meetings as the
7 consumer representative on the delegation to the OECD
8 Consumer Policy Committee in connection with its
9 drafting of consumer protection guidelines in
10 connection with e-commerce.

11 Susan?

12 MS. GRANT: Thank you.

13 Thank you very much for inviting me to speak
14 this afternoon. I'm sorry that I wasn't able to be
15 here yesterday and today, I was tied up with other
16 things, and I'm sure I would have benefitted greatly
17 from the discussion, so I hope what I have to say will
18 fit in with what you've been talking about.

19 For me and for consumer advocates around the
20 world, things like UCITA raise consumer issues that are
21 universal, the fairness of contracts, the adequacy of
22 disclosures, the fairness of competition and the
23 adequacy of consumer recourse. These are issues that
24 are addressed by consumer statutes and regulations,
25 some better than others, in countries throughout the

1 world.

2 What we're seeing now is alarming to me, the
3 attempt by some powerful corporate interests to create
4 a new cyber-marketplace that has even weaker rules than
5 exist in the physical world and where businesses
6 dictate how consumers will be treated. This is perhaps
7 understandable, but it's inevitably short-sighted, for
8 the rules that protect consumers and ensure fair
9 competition generate confidence in the marketplace.
10 When the rules are too weak or absent altogether, that
11 confidence and the marketplace itself are harmed.

12 In the Trans-Atlantic Consumer Dialogue, which
13 as Hugh mentioned is comprised of consumer
14 organizations from the U.S. and European Union
15 countries and was formed to provide input to our
16 governments about cross-border trade issues, the
17 e-commerce working group has considered these and other
18 issues carefully, and we've developed several policy
19 resolutions that speak to them. All of them can be
20 found on the www.tacd.org website under electronic
21 commerce.

22 While there's no policy paper specifically on
23 UCITA, the concerns that it raises are reflected in
24 many of the resolutions. For instance, in the first
25 one on consumer protection and electronic commerce, it

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 says that advertising should be truthful and provide
2 complete information necessary to make an informed
3 choice. It recognizes that the goals for a consumer
4 protection framework in global electronic commerce
5 should be to foster justified consumer confidence, fair
6 competition and economic development around the world,
7 and it says that consumers should be able to expect at
8 least the same level of protection in the virtual
9 marketplace as they have in the real marketplace.

10 Other TACD resolutions go on to describe in
11 more detail how our vision of the electronic
12 marketplace should work, including minimum disclosure
13 standards, core consumer protection principles,
14 intellectual property rights and how those should be
15 dealt with and unfair contracts. The unfair contracts
16 text is worth reading in the context of UCITA. It
17 says, and I quote, "Disputes over jurisdiction in
18 cyberspace have led to increased interest in the role
19 of contracts to define rights and transactions
20 involving sellers and consumers; however, policy makers
21 should be wary of measures that permit sellers to
22 enforce unreasonable contract terms. Various click-on
23 type contracts used in web pages today are often
24 one-sided measures that unfairly would limit consumer
25 rights in a wide range of areas, including the rights

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 to benefit, print exceptions and limitations of
2 copyright, the rights to criticize products, the right
3 to offer competing products, the right to seek redress
4 for defective products or service, and many other
5 important consumer rights."

6 There are also papers from TACD on jurisdiction
7 and alternative dispute resolution that strongly state
8 our view that consumers must not be asked to waive the
9 rights that they have in the laws of their respective
10 countries and must retain the right to resort to their
11 own courts.

12 Of particular concern to TACD members are
13 described by seller approaches in the development of
14 electronic commerce. Consumers do not and never will
15 have parity with businesses. They lack the
16 sophistication, the knowledge of law and the resources
17 that businesses have. They can make informed choices
18 only to the extent that they have information that is
19 accurate, that's complete, that they can reasonably
20 comprehend and where they fully understand the
21 consequences.

22 We, at least here in the U.S., generally don't
23 allow consumers to waive their rights to vital
24 disclosures, protection from defective or dangerous
25 products or legal recourse because we recognize that

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 this is socially inappropriate and counterproductive to
2 a healthy business environment.

3 Consumers should support e-tailers that offer
4 them the best value, that they are not in a position to
5 make decisions such as choice of law, nor should they
6 be obliged to sacrifice other basic rights in order to
7 get the products or services that they want.

8 While TACD members appreciate the need to
9 create good alternative dispute resolution systems for
10 e-commerce given the very global nature of it, we
11 oppose contract terms that require mandatory ADR for
12 consumers and binding arbitration that deprives them of
13 their legal rights and recourse.

14 Consumer organizations around the world believe
15 that as we develop electronic commerce, universal
16 consumer protection and fair competition principles
17 must be viewed as part of the solution to making it
18 work and work well, not as obstacles to be circumvented
19 by hiding information, binding consumers to unfair
20 terms and denying them appropriate recourse.

21 I would encourage everyone involved in creating
22 this new marketplace to keep in mind that consumers
23 fuel the engine of commerce. If they are treated
24 unfairly, the engine could sputter to a stop. Measures
25 like UCITA are inherently unfair and will ultimately

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 cause that engine to backfire.

2 In contrast, offering consumers the best
3 products and services at terms that are transparent and
4 attractive, along with providing outstanding customer
5 service and options for dispute resolution will combine
6 as the premium gasoline that makes that engine purr.

7 I think I'll stop with the car analogies and
8 with my remarks at this point. Thank you.

9 MR. STEVENSON: Thank you, Susan. We will roar
10 ahead now to Dawn Friedkin, and Dawn has come to us
11 from Paris. She is formerly on the general counsel's
12 staff at the Department of Commerce and is now working
13 at the Consumer Policy Committee for the OECD, and
14 she's going to tell us a little bit about that
15 organization and what's happened there.

16 MS. FRIEDKIN: First of all, I'd just like to
17 thank the Federal Trade Commission for giving me a good
18 reason to come back home for a couple days. It's
19 always nice to cross the Atlantic when you know the
20 final destination is home.

21 I know it's late in the afternoon, you've all
22 been here for two days, we've learned a lot and heard a
23 lot. I'm going to give you a little bit of a
24 background of the organization for which I work, the
25 Organization for Economic Cooperation and Development,

1 and then talk specifically about the consumer
2 protection guidelines we adopted last fall or last
3 December and specifically about some principles you
4 might find interesting in your conversations here
5 domestically.

6 The OECD, which that's who I represent today ,
7 is an intergovernmental organization comprised of 29
8 member countries. The best way at least in Washington
9 to think about it is as a Paris-based supergovernmental
10 think tank, if that's not a mouthful.

11 The OECD is a forum for discussion of economic
12 and social policy. We focus and have expertise in
13 legal, technological and a policy history and expertise
14 in electronic commerce, especially in the areas of
15 privacy, consumer protection, security and
16 authentication. We're best known for the guidelines
17 we've created over about the past ten years beginning
18 with in 1980 the privacy guidelines; 1992, security and
19 information systems guidelines; 1997, the cryptography
20 guidelines; and in 2000, the consumer protection
21 guidelines.

22 What works about the OECD is that we do not
23 offer a single model but recognize and work to bridge
24 different cultural approaches, laws and policies. Our
25 framework ensures that national efforts compliment and

1 reinforce each other and that experience is what works
2 and what does not work are widely shared.

3 I am going to go ahead and skip over this
4 because it's probably not of much interest to you, but
5 it gives a background of what we've done and how we've
6 developed the e-commerce policies over the last three
7 years.

8 This also gives you a background of the
9 different areas in e-commerce that we work. The group
10 that I particularly work in does most privacy
11 protection, consumer protection, authentication and
12 security. I'm sorry, I need a bigger desk or a smaller
13 computer.

14 I'm going to get right down to it, which I
15 think is probably why I'm here, is really to talk about
16 the guidelines for consumer protection in the context
17 of electronic commerce. We have this cute little book
18 that you can buy from our website or, in fact, just
19 download the guidelines themselves.

20 The history of the guidelines is they were
21 adopted last December, and the purpose for the
22 guidelines really was developed -- it was based on the
23 fact that as we moved into a global environment,
24 consumer protection laws, as you all know we've been
25 talking about, are really based on state and -- excuse

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 me, national borders and, in fact, in the United States
2 on state borders. So, the goal here was to come up
3 with a more global approach, which is what the OECD is
4 known for its work, and the guidelines really represent
5 existing legal protections available to consumers from
6 more traditional forms of commerce. We weren't trying
7 to recreate the wheel but, in fact, find more consensus
8 among the wheels.

9 And really, with the key focus of the
10 guidelines being that they were designed to help
11 ensure, as you can see here, that online consumers are
12 no less protected when shopping online than when buying
13 from their local store or from a catalog, as Susan
14 talked about earlier, that they really shouldn't lose
15 protections just because they have chosen to go online.

16 The guidelines focus in eight main areas, which
17 are clearly displayed here, transparent and effective
18 protection, fair business, advertising and marketing
19 practices, principle 3, which is bolded, because I
20 think you'll find it one of the more interesting ones
21 in the context of our discussions of the last two days,
22 online disclosures relating to the information about
23 the business, the goods and services and the
24 transaction. It should be a transparent process for
25 the confirmation of transactions.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Secure payment mechanisms and information on
2 the level of security. Dispute resolution and redress,
3 which actually contains the applicable law and
4 jurisdiction and choice of forum section. Privacy
5 protection, education and awareness.

6 If I could pull out for a moment the two
7 sections really that we'll focus on, 3 and 6, obviously
8 the guidelines have much stronger principles under each
9 one of those, but I -- rather than burying you through
10 all of them, I invite you to take a look at the OECD
11 website and see that and really just to focus on the
12 principles we're talking about now.

13 Online disclosures, the text of the guidelines,
14 when I went to law school, they taught me the one thing
15 that you don't do is paraphrase a statute, so I'm not
16 even going to try to do that, and I think we'll just
17 look right at the language of the guidelines.

18 Again, I remind you that the 29 countries
19 worked to consensus on this language. It probably
20 doesn't look like great brain power here went behind
21 this, because you're used to laws like this, but for
22 some of these countries, it was very new, and for some
23 of them it was old hat, and they really understood it
24 this, but it was really a long process to make this
25 happen, and a lot of those at the FTC were very

1 involved in it, and we're pretty grateful for all their
2 work.

3 But the principle on online disclosures really
4 leads into the fact, and I've underlined this section,
5 but generally provides that businesses engaged in
6 electronic commerce with consumers should provide
7 accurate and easily accessible information describing
8 the goods or services offered sufficient to enable
9 consumers to make an informed decision about whether to
10 enter into the transaction. You can read that if you
11 want.

12 The next line, which is really about the
13 transaction itself, again, very similar language, and
14 again, with the same sort of language, to make an
15 informed decision about whether to enter into the
16 transaction.

17 And it continues on in this section, where such
18 information should be clear, accurate, easily
19 accessible and provided in a manner that gives
20 consumers an adequate opportunity for review before
21 entering into the transaction, and such information
22 should include available warranties and guarantees.

23 Now, I should have made this statement earlier
24 which I think I forgot in my small desk space here, but
25 the OECD has actually not worked in the area of

1 high-tech warranties for goods and services, so that
2 the things that I'm excerpting here were really based
3 on the work that we did to develop these guidelines,
4 which were really based on business-to-consumer
5 transactions. To the best of my knowledge, and I
6 invite anyone from FTC or David Fares from USCIB, who
7 were also involved in the process, to correct me if I'm
8 wrong, but there was not that I remember any specific
9 conversation on the topic we've been talking about for
10 the last two days, but I thought that these principles
11 on online disclosures you might find interesting being
12 that they were developed in an international context.

13 In the area of -- excuse me, on choice of law
14 and forum, really the tack that we took in this area,
15 as you can imagine, as you might be aware, it's a very
16 difficult area in the international context, which I
17 think other folks here might go into a little bit
18 later, but under the section of dispute resolution and
19 redress in the guidelines was the applicable law and
20 jurisdiction section, and it reads as follows:

21 Business-to-consumer cross-border transactions,
22 whether carried out electronically or otherwise, are
23 subject to the existing legal framework on applicable
24 law and jurisdiction.

25 E-commerce poses challenges to this existing

1 framework, so there's a recognition of the framework
2 obviously, and therefore, consideration should be given
3 to whether the existing framework for applicable law
4 and jurisdiction should be modified or applied
5 differently.

6 So, a recognition of review, but again, not too
7 much consensus in a substantive way on which way to go.
8 We struggled with the rule of origination and rule of
9 destination.

10 Again, this section also -- sorry, continued
11 on, and in the consideration it gave guidance, the
12 recommendation gave guidance for when we are reviewing
13 the frameworks, the legal frameworks, of things that we
14 should consider, which are probably not surprising to
15 most of you, which really result around fairness on
16 both the consumer and business side.

17 Another issue I thought you might find
18 interesting that is contained in the guidelines is
19 language. The gentleman from Silver Platter yesterday,
20 I believe, was mentioning how they have their terms and
21 conditions available on the website in a variety of
22 different languages. This was actually a very
23 important discussion we had at the OECD trying to
24 figure out what was appropriate in recommending to
25 businesses engaged in online commerce with consumers,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 and it just really enforces the fact that if you're
2 starting a transaction in one language, all the related
3 terms for that transaction should be available in that
4 same language.

5 So, in conclusion, I just want to sum up with
6 what I was talking about earlier about my little minor
7 disclaimer and the fact that we really haven't worked
8 in this area and that the guidelines themselves are not
9 intended specifically for this area, but they were, in
10 fact, intended for global electronic commerce between
11 business and consumers, but that you can take from my
12 presentation, I think, and from the language of the
13 guidelines that they do provide specifically that
14 businesses engaged in electronic commerce should
15 provide consumers the information necessary to make an
16 informed decision about whether to enter into the
17 transaction.

18 And with that, I end my presentation, welcome
19 questions, and welcome Carina all the way from
20 Brussels.

21 MR. STEVENSON: Thank you, Dawn, I appreciate
22 that.

23 I don't know whether people who were involved
24 have a memory of this in connection with the
25 guidelines, and perhaps you do, Susan, I seem to

1 remember that there were some discussions about the
2 transactions involving software in connection with the
3 drafting of the guidelines.

4 MS. GRANT: Yes, certainly were, right.

5 MR. FARES: I don't recall specific
6 conversationS about that, but I could be -- it was a
7 long period, and it could be escaping me.

8 MS. FRIEDKIN: And I guess I could say I wasn't
9 at the OECD at the time during the drafting, I was, in
10 fact, part of the U.S. delegation.

11 MR. STEVENSON: Thank you, Dawn.

12 Well, we have just in time our next speaker who
13 we're delighted to have here, Carina Tornblum from the
14 European Commission, the Consumer Protection
15 Directorate, who we have the pleasure of dealing with
16 on a number of subjects, and we thought it would be
17 helpful to hear a little bit about the European
18 Commission's perspective on some of the issues that
19 we've been talking about here, choice of law, choice of
20 forum and transaction disclosures.

21 Carina?

22 MS. TORNBLUM: Thanks. Thank you, very much,
23 and I'm terribly, terribly sorry I'm late, because I
24 would like to have listened to the former speakers, as
25 well, but there you are. Not easy to travel from

1 Europe to here, lots of obstacles on the way.
2 Well, I'm very pleased to be here and to be
3 able to also I hope listen and learn a lot from you,
4 because I think in my experience the consumer problems
5 that we will have in Europe already exist, especially
6 in this area, the high-tech area, and issues concerning
7 to the internet.

8 Looking at the European situation, I'd like to
9 just clarify one thing, and that is that we do not have
10 any legislation on community level that specifically
11 deals with these particular issues that we are
12 addressing today, and these kind -- the kind of
13 warranties that cater to this kind of product, and that
14 is perhaps a bit of a -- will be a bit of a problem for
15 us in the future, might be, and that remains to be
16 seen, learning from you.

17 But we do have two directives that -- well,
18 could cover or partly covers these problems and where
19 we can also then get into how we would treat the choice
20 of law and the forum. We have, for instance, quite a
21 recent directive that is called the Directive on
22 Certain Aspects of Sale of Consumer Goods and
23 Associated Guarantees, and that directive by some is
24 said to cover partly these problems.

25 And I mean, it depends on how you look at

1 software, if it's considered a tangible, movable item,
2 and it certainly would be if you were to take -- to buy
3 the product in a shop and physically bring it back, but
4 there are also some that interpret this to cover also a
5 product like this where you have the -- that you have
6 actually -- have transferred to you electronically,
7 because then it exists physically in your PC.

8 I don't know, and actually, it remains for the
9 European Court to settle these issues, and we don't
10 have any cases, because this directive will not come
11 into force until January 2002, and then it will be
12 implemented into the national legislation.

13 Also -- so, I think -- well, we have also
14 another directive, and that concerns the distant
15 selling of services and goods, and there are some
16 exemptions where it -- that are not interesting today,
17 so I will not go into that, but that directive actually
18 caters to the right of the consumer to have information
19 and to have the information at the specific moment.
20 All the more important information should be given to
21 the consumer prior to the delivery of the goods but at
22 the latest at the delivery of the goods.

23 But on the other hand, the consumer has seven
24 days to actually cancel the contract as a cooling-off
25 period. So, if you were to receive the information

1 when the service or the goods is delivered to you, you
2 find out that it doesn't meet what you expected, then
3 you can actually just free of charge get out of the
4 contract, and that might be a good solution.

5 And then, of course, we have the problem with
6 the choice of law and jurisdiction, and also that is --
7 in Europe, that still is the Brussels Convention
8 concerning jurisdiction and the rule concerning the
9 choice of law, and these are now, as I'm sure several
10 of you in this room know, are now being amended and --
11 well, not amended but negotiated and are now in what we
12 call the Brussels regulation in the future, and this is
13 all part of the discussion that is taking place in The
14 Hague, The Hague Conference, where we are talking about
15 this on a more international level, global level.

16 Anyway, what you can say is that the consumer
17 is well protected because it's actually, if you look at
18 it and try and summarize it, in the end, if the
19 consumer doesn't agree to anything else, it will be
20 that the law and the forum of the consumer that will be
21 applied, but it is possible for the consumer to make
22 another choice, and if the company would in a contract
23 try to make, for instance, the consumer waive these
24 rights, it would not be valid as a contract term.

25 I think that about sums it up, the situation we

1 are in at the moment, but still, as I said, this
2 particular directive concerning guarantees remains to
3 be interpreted, and it might very well turn out that we
4 don't have the actual legislation that caters to the
5 consumer interests in the end.

6 MR. STEVENSON: Carina, thank you very much, we
7 appreciate that.

8 Our fourth speaker before we turn to a few
9 questions is David Fares, who comes to us on behalf of
10 the USCIB and is a frequent and very articulate
11 spokesman on their behalf, and we appreciate him coming
12 from New York, as we appreciate Dawn coming from Paris
13 and Carina from Brussels and Susan I guess from --

14 MS. GRANT: Down the street.

15 MR. STEVENSON: -- down the street, yeah.
16 David.

17 MR. FARES: Thanks, Hugh.

18 I just want to tell you briefly how I fit into
19 this and how the organization I work for, the U.S.
20 Council for International Business, fits into this
21 whole dialogue. We serve as the U.S. affiliate to both
22 the International Chamber of Commerce, which is the
23 world business organization, the only business
24 organization that represents global business across all
25 sectors; and secondly we serve as the U.S. affiliate to

1 the Business and Industry Advisory Committee to the
2 OECD, which is the official voice of business into the
3 OECD. So, we were actively engaged in participating in
4 the development of the OECD consumer protection
5 guidelines.

6 Most of my remarks today are going to focus on
7 the choice of law and choice of forum issue, but there
8 is one point that I would like to point out that comes
9 directly from the OECD consumer protection guidelines,
10 as well, and that is from the first general principle,
11 which is transparent and effective protection.

12 The guidelines state that governments,
13 businesses -- excuse me, consumers who participate in
14 electronic commerce should be afforded transparent and
15 effective consumer protection that is not less than the
16 level of protection afforded in other forms of
17 commerce. The rationale behind that provision in the
18 guidelines -- an earlier provision was equivalent
19 protection -- but the reason for level of protection is
20 because protections that exist in the offline world are
21 not necessarily transferable directly to the online
22 world, but over and above that, there are some consumer
23 empowering mechanisms that exist in the online world
24 that don't exist in the offline word.

25 So, you have to look at the totality of the

1 circumstances, the totality of the protections in the
2 empowering mechanisms that exist to ensure that
3 consumers receive an adequate level of protection that
4 is based on -- as they do in other forms of commerce.

5 I'm now going to move to the choice of law and
6 choice of forum provision, and as stated in the
7 consumer protection guidelines which Dawn referred to,
8 in the choice of law and forum provision, it recognizes
9 that electronic commerce poses challenges to the
10 existing framework for choice of law and choice of
11 forum. I'm going to focus -- and this is in the
12 context of business-to-consumer transactions,
13 obviously.

14 I'm going to be focusing on some of those
15 challenges so that we can understand where the business
16 community is coming from. In general, when it comes to
17 choice of law and choice of forum, the business
18 community supports the country of origin principle,
19 which is the principle that the law and the courts
20 where the seller resides is the law that should be
21 applied and the courts that should have jurisdiction to
22 hear a case.

23 The reason for this is that it is extremely
24 difficult, if not impossible, for businesses to comply
25 with the laws of all the countries around the world

1 from which their website can be accessed, in particular
2 because there are laws that actually conflict with one
3 another among countries. This is especially difficult
4 for small and medium-sized enterprises that probably do
5 not have a physical presence in any country outside of
6 the country in which they're established -- one single
7 country where they're established.

8 Therefore, they could be subjected to all these
9 conflicting laws or sometimes contradictory laws, and
10 as we know, small and medium-sized enterprises are
11 often the engine of the economic growth that the United
12 States is experiencing. So, we don't want to hinder
13 their ability to go online and to have a global
14 marketplace from the outset, from when they put their
15 website online.

16 There are also uncertainties about where a
17 consumer resides if a transaction is completed online
18 and the product is delivered electronically. You don't
19 necessarily know where the consumer resides in those
20 types of circumstances. This is complicated even more
21 if a consumer is using some sort of information
22 intermediary to try and preserve their anonymity.
23 There is no way at that point that a business can
24 determine where the consumer resides. Therefore, a
25 business would never know what laws they're subjecting

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 themselves to.

2 What we've seen in some circumstances is
3 businesses are actually limiting on their websites the
4 jurisdictions in which they will conduct business,
5 because of some of the uncertainties created by
6 conflicting laws, et cetera. I think that this is an
7 unfortunate circumstance for consumers, because it
8 reduces choice available to consumers, thus reducing
9 competition, which ultimately reduces prices for
10 consumers and offers them greater choice, as I said
11 before.

12 I would also like to just pose a question.
13 Often times consumer representatives advocate the
14 country of destination as the appropriate law and forum
15 such that it's wherever the buyer or the consumer
16 resides. The question I ask is, does this actually
17 provide a strong protection for consumers? And the
18 reason I ask that is for several reasons.

19 First of all, often times in online
20 transactions, the case in controversy is fairly small,
21 when at the same time, to bring a judicial proceeding,
22 it's fairly expensive and time-consuming. So, a
23 consumer, if they feel aggrieved, brings an action in a
24 court, expends a lot of money and a lot of time because
25 they're bringing the case in their courts with their

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 law being applicable.

2 The problem is there's no treaty to enforce
3 foreign judgments right now. So, they've expended all
4 this time and all this energy, and they are not
5 ultimately going to be able to get the remedy that they
6 were seeking because they're not going to be able to
7 have their enforcement -- their judgment enforced in
8 another country.

9 Business does recognize the difficulties that
10 exist in this area, the complications that electronic
11 commerce poses and the challenges it poses in the
12 context of choice of law and choice of forum; the cost
13 issue, which I just brought up, it's expensive to bring
14 a case in a court; the lack of enforceability of
15 foreign judgments; and the difficulty, as well, for
16 consumers to be able to know what all the laws are
17 around the world so that they can make a decision as to
18 whether they're willing to buy a product from a company
19 that is not established in the country where they
20 reside.

21 That's why business, like the Trans-Atlantic
22 Consumer Dialogue, supports the development of
23 effective online dispute resolution mechanisms and is
24 working very hard to develop that, and they're
25 flourishing in the United States. We see all sorts of

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 online ADR mechanisms, some that are solely online,
2 some that are flexible, and some that have adapted more
3 formal and more traditional means of dispute resolution
4 to the online environment.

5 Online ADR is cost-effective, which is
6 appealing to consumers, and it's much more efficient.
7 Neither party necessarily has to travel beyond their
8 country or beyond -- outside of their country to have
9 their case heard through the online alternative dispute
10 resolution mechanism. And more importantly, it's
11 flexible. The parties can try and resolve their
12 disputes in a way that reflects their concerns. So,
13 the business community is working hard to promote the
14 effective online ADR, and in that regard, the
15 International Chamber of Commerce is co-sponsoring a
16 workshop with the OECD in The Hague conference on
17 online ADR in December at The Hague.

18 That concludes my presentation. Thank you,
19 Hugh.

20 MR. STEVENSON: David, thank you, very much.

21 Let's follow up on the choice of forum issue
22 that David ended with, which is a very interesting
23 issue, it's been addressed in a number of contexts, and
24 David mentions the possibility of ADR mechanisms.

25 Putting that aside, however, would you agree

1 that in my hypothetical, is it fair for or right or
2 appropriate as a matter of public policy for the term
3 to provide that the Cracker Jack software disputes can
4 only be resolved in the courts of Belgium, in my
5 example, for a consumer located let's say in Maryland?

6 MR. FARES: Well, I think you need to look --
7 like I said, Hugh, and within the guidelines, I think
8 you need to look at the totality of the circumstances,
9 and I think that what we hope in the context of online
10 disputes is that -- well, first what you see is
11 effective consumer satisfaction mechanisms that
12 companies have internally will resolve most disputes.
13 If they don't and you go to online ADR, the ADR
14 mechanism will resolve those disputes.

15 One of the panels in The Hague conference that
16 the OECD and ICC are co-sponsoring is the last resort
17 principle, but hopefully the consumer satisfaction
18 mechanisms and the ADR mechanisms will reduce the
19 number of claims that need to go to court so much that
20 it's much less relevant in that circumstance, and what
21 I think we need to do is evaluate fully and at an
22 international level how we go about resolving the
23 choice of law and choice of forum issue, because as you
24 know, business support the court of the country of
25 origin, most consumer advocates support the country of

1 destination, and we need to find solutions somewhere,
2 and ADR I think is our best choice in that regard.

3 MR. STEVENSON: In terms of finding solutions
4 somewhere, do you think a good place to have those
5 solutions is in state law statutes?

6 MR. FARES: As I said, I think we need to have
7 a dialogue at the international level to figure out
8 what the best mechanisms are, and hopefully ADR will
9 continue to -- as ADR grows and becomes more common
10 place, it will become less relevant for us.

11 MR. STEVENSON: Anybody else want to comment on
12 the taking your dispute to Belgium?

13 Carina?

14 MS. TORNBLOM: I'd like to say only that, I
15 mean, of course, we in Europe have taken a very firm
16 standpoint on the choice of law and that it should
17 basically -- that in consumer contracts, it should be
18 the court and the law of the consumer basically that
19 applies. We do understand the problems for a smaller
20 company. I mean, it is not as if we are totally
21 insensitive, but I think the common problems are both
22 for consumers and small companies alike, could even be
23 for bigger companies, are the costs of going to court
24 and the time that that consumes.

25 I mean, it's just too much for an ordinary

1 person, and it also depends on the money you -- that
2 are at stake here. So, I mean, the ADR is what the
3 commissioner, Mr. Byrne, is actually pushing as much as
4 he can, and since it's -- I mean, this is a problem
5 within the member states of the European Union for a
6 person that makes a contract at a distance. It's a
7 problem within the European Union if you -- because we
8 do have different legislation, I mean nationally still,
9 with only basic principles that we have agreed on.

10 Then if you look at the internet, it is a
11 global trade, that's what it is. So, we need to find a
12 solution, and we are absolutely set on finding
13 solutions on ADRs and preferably online ADRs where
14 consumers, regardless of where the company and the
15 consumer are actually located, that they can be solved.

16 But it's not only to have the system as such to
17 work, but you have to have better administrative
18 cooperation between member states. I mean, since you
19 are a true, I mean, union here and you have -- even if
20 you are states within the U.S., I mean, you have come
21 further than we have. So, we are basically starting
22 out, and we need to make our authorities of the public
23 agencies and the different member states in Europe to
24 agree to enforce any decision that is made and first
25 and foremost to cooperate on these ADR system and for

1 the countries that actually don't have these policies
2 to create them.

3 MR. STEVENSON: Susan?

4 MS. GRANT: Including those kinds of clauses in
5 contracts are an extreme and wrong-headed reaction to
6 the globalization of commerce. There are much more
7 constructive approaches, not only the development of
8 ADR, which we at the National Consumers League and at
9 other consumer organizations are actively involved in,
10 but also avoiding disputes to begin with.

11 The purpose of the OECD guidelines was to
12 encourage governments and businesses not only in the
13 member countries but around the world to look at the
14 necessary consumer protections in electronic commerce
15 and incorporate those into their laws, into their
16 business models, into their corporate policies and so
17 on.

18 To the extent that governments and businesses
19 do that, you'll find a couple of things happen. It may
20 take a while, but you will find fewer differences in
21 law between various countries, and you'll also find
22 probably fewer disputes, because if companies follow
23 the guidelines, there will be less potential for
24 consumers having problems to begin with.

25 However, it's absolutely crucial to preserve

1 the ability of consumers and those who represent them
2 to take legal action in the courts of the consumers'
3 domains under the consumers' laws in situations where
4 that is the appropriate remedy for a problem.

5 MR. STEVENSON: Susan, let me follow up with a
6 question that someone had posed to you.

7 Could you discuss the issues raised by David
8 Fares regarding the interests of small entrepreneurs in
9 selecting the law and forum of their own jurisdiction
10 to apply?

11 I'm understanding this question to focus on the
12 concerns of the small and medium enterprises.

13 MS. GRANT: I do think that that's quite a
14 valid concern, especially since in electronic commerce
15 anybody can hang up a shingle in cyberspace and do
16 business. I do think that the private sector can be of
17 considerable assistance here. There are trade
18 associations who give advice to their members. They
19 tend to have high barriers to entry in some cases in
20 terms of the cost of participating. Perhaps that could
21 be looked at in terms of sliding scales, or advice
22 could be put out there for people -- and it is already
23 out there in a number of ways through the OECD website
24 and other places, to help businesses, even small and
25 medium-sized businesses, know what they can do to

1 reduce the potential for consumer complaints and know
2 what systems they might be able to participate in in
3 order to provide online mechanisms for redress.

4 Of course, all companies, large and small, can
5 resolve consumer complaints themselves without it
6 having to go any further, but in situations where for
7 one reason or another that's not possible because the
8 consumer is unreasonable, which is certainly the case
9 sometimes, or where the business is or where there's a
10 valid difference of opinion about what happened or what
11 should be the result, then there are systems that are
12 being developed that hopefully will be cost-effective
13 for businesses to participate in as well as consumers.

14 MR. STEVENSON: Thank you, Susan.

15 Let's switch from choice of forum to choice of
16 law, but just to follow up on I think something both
17 David and Carina referred to, there is under
18 negotiation a convention on judgment recognition and
19 jurisdiction, which I believe it's fair to say may be
20 over by a little bit, that it does at least in its
21 draft form have in its provision choice of forum but
22 not, I believe, choice of law.

23 Let's talk about choice of law for a moment,
24 and I want to just both read a line from the comments
25 in UCITA and then one of the questions we got. This is

1 in the section on choice of law, 109, and the comments
2 say that this subsection A here does not follow UCC
3 1-105, blah-blah-blah, requires that the selected state
4 have a "reasonable relationship" to the transaction.
5 Is it reasonable to require a reasonable relationship,
6 or is it reasonable to have an unreasonable
7 relationship? And if it's an unreasonable
8 relationship, then is there anything that prevents the
9 law of North Korea, the Netherlands, Iran, India,
10 applying?

11 And I guess I'll follow up that question with
12 this one I received from an inquiring mind in the
13 audience. I'm trying to understand the license
14 restrictions on my use of WordPerfect Clip Art. Can
15 any of you international legal experts tell me what
16 "scandalous" means under Irish law? But keep it clean.

17 Does anyone have any thoughts on that?

18 MS. GRANT: I would bet that it's different
19 than U.S. law, just knowing how conservative a place
20 Ireland is.

21 MR. STEVENSON: Any other bets?

22 MR. FARES: I'm risk-averse.

23 MR. STEVENSON: Okay, risk-averse. Is our --
24 go ahead.

25 MS. TORNBLOM: I'm not sure if I understood the

1 question correctly, but it was about not being able to
2 understand the instructions and the language of
3 whatever it was in the contract, was it?

4 MR. STEVENSON: Well, I guess this goes -- as I
5 understand the provision, and I hope I don't have this
6 wrong, that the UCITA provision does not rule out
7 applying the various systems of laws to a contract.
8 Now, I should say that 109 has other provisions in it
9 that -- well, like everybody else, I advise you to read
10 yourselves, but I guess I was trying to get at whether
11 even that basic proposition as suggested in the
12 comments is something people agree with or not.

13 MR. FARES: I mean, I am going to disclaim the
14 fact that I am not representing a consensus position of
15 my organization, but just speaking about some theories
16 that have been thrown out about the choice of law that
17 have been discussed by some legal experts, and the
18 first one is the deference analysis. Some U.S.
19 attorneys came up with this concept, that what you
20 could do is evaluate the consumer protections that
21 exist in different countries, and if they're fairly
22 similar, that the court would defer to the law of the
23 country as specified in the contract. So, there's some
24 sort of analysis as to the effectiveness of the law.

25 Another idea that has been discussed is to

1 create some sort of mechanism by which there's a
2 minimum level of consumer protections that exist, and
3 if those consumer protections exist at the same time --
4 I mean, it's similar to the deference analysis but may
5 be a more formalized agreement by which states would
6 sign up to an agreement that if a choice of law
7 provision calls for the law of, let's say, Spain and
8 Spain is a part of this agreement, that they would
9 apply the laws of Spain.

10 So, there are some theories out there about how
11 you can deal with the choice of law, and that's both
12 for the choice of law and choice of forum. So, those
13 are just some ideas that have been proposed by the
14 legal community and some people in the business
15 community, as well.

16 MR. STEVENSON: Go ahead.

17 MS. TORNBLOM: Yeah, I would like to refer back
18 to this Rome Convention, the European way of dealing
19 with this. I mean, basically the consumer can enter
20 into a contract also deciding on another applicable law
21 than that of his own country, but whatever he has done,
22 he will never be deprived of the rights of consumer
23 protection that exist in his own home country. So, if
24 they are good, they will remain there, whatever has
25 been, you know, decided upon, because some consumers

1 may think that they will win and that they will gain
2 something by entering into a contract agreeing to
3 another applicable law than that of their own home
4 country, and if that was -- I mean, it might very well
5 be true, but if it isn't, they still have the
6 protection of their own home country, and which is good
7 in the sense that at least that is what a consumer is
8 supposed to know. I mean, we are supposed to expect at
9 least that level of protection.

10 MR. STEVENSON: Okay, if I could follow that up
11 with another question we received, is there a
12 distinction in the Brussels or the Rome regulations
13 between goods that are delivered electronically versus
14 physically?

15 MS. TORNBLUM: No. To be very, very honest
16 here, I am not an expert of these conventions, they are
17 quite tricky, and you need to know a lot of case law in
18 order to see how they are interpreted, but as far as I
19 know, no, there isn't, but I mean, of course, in
20 practice it's so difficult to decide actually on these
21 contracts, because if you enter into anything that is
22 in cyberspace, that is why we are now discussing any
23 kind of other solutions to the problems in order to
24 avoid ending up in discussions where we find that the
25 result is that it is not the consumer's legislation

1 that applies. I mean, trying to find practical
2 solutions to this theoretical legal discussion.

3 MR. STEVENSON: Right. To follow up on that
4 point, UCITA makes some distinction between goods
5 delivered electronically and goods -- or, I'm sorry,
6 goods -- when there's a delivery of a copy on a
7 tangible medium or not and as to what the default rules
8 should be.

9 Does it make sense just as a matter of policy
10 to make that kind of distinction between a contract
11 that requires delivery of a copy on a tangible medium
12 and one that involves downloading, for example,
13 software over the internet?

14 MS. FRIEDKIN: I guess my comment comes much
15 more from a logical point of view. I'm not sure that I
16 have the answer when there should be a distinction,
17 because I'm not sure I know the nuances of the
18 different treaties and different policies that are in
19 the legal framework, but I think as a general matter, I
20 think the identification of where a consumer is is much
21 more difficult if you're downloading information versus
22 sending a package via mail with an address.

23 So, I think in that general sense, it just
24 complicates it more, and I think that's why, again, at
25 the risk of sounding like a broken record, most people

1 involved in the international discussion are really
2 looking for other ways to ensure we get redress,
3 because e-commerce is out in the marketplace already
4 and moving fast, and people are engaging in it, and we
5 want to make sure it continues, but we also want to
6 make sure people are protected in getting the redress
7 they deserve.

8 MS. GRANT: I want to echo what Dawn said.
9 It's a distinction without a difference, and it's
10 unnecessary -- you know, UCITA itself is not necessary
11 and it's not the right way to try to resolve the valid
12 issues that e-tailers have.

13 MR. STEVENSON: Okay, we have another question
14 for David Fares, and this is picking up on the ADR
15 theme.

16 Is there an accreditation process or way of
17 verifying reputable online ADR services?

18 MR. FARES: I don't know right now if there are
19 accreditation schemes. What I can tell you is that the
20 Global Business Dialogue on Electronic Commerce
21 recently issued a set -- they had their CEO conference
22 in September in Miami, and they issued a set of
23 principles that ADR providers should be following. So,
24 their business best practices.

25 At the same time, there were some conversations

1 at the European level about confidence in electronic
2 commerce and in ADR mechanisms. The International
3 Chamber of Commerce, of which we're the U.S. affiliate,
4 is also doing some work in the area of online ADR and
5 probably in December will be launching a program at the
6 workshop where they will be addressing some of these
7 issues.

8 MR. STEVENSON: Okay, Carina?

9 MS. TORNBLUM: Yeah, I'd like to confirm that
10 there are at least discussions taking place now in
11 Europe, because our commissioner, he has an approach
12 which contains three steps. One, and that coincides
13 with what you said, you have to have a proactive
14 approach. You can't make it too complicated for
15 consumers to know whether to buy or not to buy from a
16 certain seller. So, you need what we call a trust
17 mark.

18 And to get this trust mark, there is an ongoing
19 discussion now within an interservice group in the
20 Commission where we are discussing the possibility of a
21 system for accreditation, because I mean there should
22 be criteria involved, and if you are to have this trust
23 mark as a company, you have it on your website, there
24 must be a real quality control behind that. Otherwise,
25 consumers will be disappointed, and not only with that

1 company but perhaps with buying things on the internet
2 as a whole, and that is not good.

3 Now, the second step is what you already have
4 in your legislation and which we don't have in Europe,
5 because our banks can't handle this yet, and that's the
6 system for chargeback. That's a very important thing,
7 because whatever right chargeback -- so, if you want
8 your money back because the contract is null and void,
9 you've changed your mind, remember I said we have a
10 seven-day cooling-off period?

11 Well, if you happen to have paid before that
12 for any reason, in advance or any other way, then it's
13 very well to be able to cancel the contract, but then
14 you want your money back, and then you end up in a
15 dispute with someone far out, far away in cyberspace
16 somewhere, and that is not easy, and we don't have the
17 possibility to just say to our banks, I want the money
18 bank, and they handle it. That's not the way it works,
19 unfortunately, yet in Europe. So, that is a very, very
20 important thing. In some member states it does but not
21 in Europe as a whole, and that's a big risk for a
22 consumer. We need to settle that. That's the second
23 thing.

24 And also the ADR system that we are gradually
25 building, what we call the EUJNet, European Union

1 Judicial Network, and hopefully that will be online,
2 and we will see what we can do to cooperate with you in
3 the U.S. in the future, but these are not self-evident
4 steps, because things are not as developed in some ways
5 and in some of the member states in Europe as things --
6 we are not at the same level here.

7 MR. STEVENSON: David, quickly, last word?

8 MR. FARES: Dawn, did you want to say
9 something?

10 MS. FRIEDKIN: Yeah, if I could add quickly
11 first, I guess one thing to talk about when you talk
12 about accreditation, I think there are a lot of notions
13 that get spread that we'd all like to see happen, but
14 e-commerce is moving so fast and changing that I think
15 a lot of people involved in the debate, especially at
16 the international level, are trying to find, as I say,
17 kind of interim solutions that become bigger, broader,
18 more robust solutions in the end.

19 One thing, when the U.S. held its workshop this
20 past summer on ADR, one of the things that I tend to
21 quote quite often is that the ADR providers at the
22 workshop were arguing about who had been in business
23 longer, and they were talking about months. They
24 weren't talking about years or decades. So, it's new.

25 So, I think talking about accreditation makes

1 sense in the concept of -- as an intellectual pursuit,
2 but I think as a practical matter, we're moving in
3 directions of that, but I think it's early for that.

4 One thing in our workshop that we're going to
5 be doing is talking about the variety of different
6 principles that have been set out there for effective
7 ADRs, like the Global Business Dialogue and the TACD
8 and the Commission, and then principles that weren't
9 officially probably found from the U.S. workshop but
10 that you can glean from the work that they did.

11 In talking about the differences of these
12 principles, not necessarily for the purpose of
13 accreditation but to understand what effective ADR is,
14 and I think we're moving in that direction, but I think
15 everyone probably agrees that, you know, what we decide
16 tomorrow may not be good in a month, and so we want to
17 make sure that we're doing this well but also providing
18 the redress that we need now.

19 MR. STEVENSON: Great.

20 We will give you the last word -- actually, I
21 will give myself the last word, better idea.

22 If you like this discussion, you will love our
23 publication, Consumer Protection in the Global
24 Electronic Marketplace, which I just mention because a
25 number of these issues have been, as everyone has

1 suggested, the source of ongoing dialogue in a number
2 of places, and I'd like to thank our panelists again
3 for being here today.

4 Thank you.

5 (Applause.)

6 MS. MAJOR: Let's take a two-minute break,
7 there are cookies and refreshments out there, and give
8 the next panel a chance to set up, and we will start
9 right away.

10 (A brief recess was taken.)

11 MS. MAJOR: Okay, we are going to get started
12 now, even though everybody's still getting settled. I
13 want to first acknowledge the software and information
14 industry association for kindly and generously
15 providing the coffee and pastries this morning, and I'm
16 sure you all appreciate that very much, and also the
17 Business Software Alliance again this afternoon
18 provided the cookies and sodas that you're all enjoying
19 right now. So, I very much thank them for offering to
20 do that for us.

21 This panel, we have heard a number of times
22 throughout today and yesterday the intellectual
23 property issues that have been alluded to, and this
24 panel is dedicated to discussing the IP issues that
25 arise associated with computer information

1 transactions, and I have the honor to introduce our
2 distinguished panelists.

3 First, Charles McManis. He is a professor at
4 Washington University in St. Louis, where he teaches
5 torts and several intellectual property courses and IP
6 courses that are related to international trade.
7 Professor McManis is a member of the American Law
8 Institute and the International Association of Teachers
9 and Researchers of Intellectual Property, and Professor
10 McManis has published numerous articles in this area.

11 Next to him, on his right, is Professor
12 Reichman. Professor Reichman teaches at Duke
13 University, and he teaches in the field of contracts
14 and intellectual property law, as well. Before coming
15 to Duke, he taught at Vanderbilt, Michigan, Florida and
16 Ohio State Universities, and also at the University of
17 Rome in Italy. Professor Reichman has written and
18 lectured widely on all aspects of intellectual property
19 law, and his most recent writings have focused on the
20 ongoing controversies about IP rights and data and the
21 appropriate contractual regime for online delivery of
22 computer programs and other information goods.

23 Lorin Brennan, who will be sitting next to --
24 well, actually, is on the other side of Professor
25 Cohen, Lorin Brennan we're pleased to have with us

1 today is a California attorney specializing in
2 international intellectual property licensing. He is a
3 principal in a software development firm called Grey
4 Matter, which he co-founded in 1999. The firm develops
5 automated contracting and rights management software
6 for intellectual property licensing, and Mr. Brennan
7 has written several articles, as well, about
8 intellectual property.

9 And finally, Professor Julie Cohen, who teaches
10 at Georgetown University Law Center, and Professor
11 Cohen teaches and writes about intellectual property
12 law, data privacy law, with particular focus on
13 computer software and digital works and on the
14 intersection of copyright, privacy and First Amendment
15 in cyberspace, and I am just truly delighted to have
16 all four of them with us today, and we will start with
17 Professor McManis.

18 MR. McMANIS: Thank you, April.

19 I'm delighted, indeed relieved, to be here
20 inasmuch as ever since UCITA was finalized by NCCUSL, I
21 have been hoping the Federal Trade Commission will step
22 in and begin to reformulate or formulate a federal
23 policy in this matter.

24 I'll spend my 15 minutes of fame responding as
25 briefly as I can to five specific questions the FTC has

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 asked this panel to address; however, because I view
2 the first two questions as variations on one question
3 and the last two questions as variations on another and
4 the one that most interests me is the one right in the
5 middle, I will quickly dispose of the first two and
6 then get on to the last three.

7 As to the first two questions, whether
8 intellectual property law adequately protects computer
9 programs and whether software should be treated
10 differently than other intellectual property, I'd
11 simply note that many IP academics and practitioners
12 have argued that computer software does not fit easily
13 into the existing categories of intellectual property
14 protection, such as federal copyright protection, which
15 in some respects overprotects and in other respects
16 underprotects computer software.

17 Indeed, my co-panelist, Professor Reichman, has
18 rather cogently argued that what's needed is a sui
19 generis form of intellectual property protection that
20 he calls portable or constructive trade secret
21 protection, a kind of limited lead time protection for
22 software.

23 For the moment, however, the debate over both
24 of the first two questions is essentially moot as the
25 United States Congress in its wisdom has made it

1 unmistakably clear when it amended the Copyright Act in
2 1980 that federal copyright law is to be the principal
3 means of intellectual property protection for computer
4 programs and that computer programs are to be protected
5 like any other copyrighted work, except where the
6 Copyright Act makes special provision for software.

7 Given that basic policy determination by
8 Congress, it's essentially the role of the courts, and
9 I would add the role of such agencies as the Federal
10 Trade Commission, to engage in such interstitial law
11 making as is necessary to ensure that this basic
12 congressional policy works as intended.

13 This, then, brings me quickly to the third
14 question posed by the FTC, whether licensing agreements
15 can preempt federal law and particularly federal
16 copyright law. Unfortunately, the question is
17 ambiguous. If the term "preempt" is being used in its
18 technical legal sense, then the answer, of course, is
19 obviously no. Neither state law nor contracts created
20 pursuant to state law may preempt federal law.

21 To the contrary, the case law decided pursuant
22 to the Supremacy Clause of the United States
23 Constitution makes it abundantly clear that in case of
24 conflicts between state and federal law or between
25 federal law and contracts created pursuant to state

1 law, the federal law is supreme and preempts state law.

2 If, on the other hand, the term "preempt" is
3 being used in a looser, nontechnical sense, and the
4 question is simply whether contracts made enforceable
5 by state law can, in effect, contract around or
6 contractually abrogate certain privileges that the
7 federal copyright law creates for users of copyrighted
8 works, then we have arrived at the heart of the federal
9 preemption question that UCITA poses, and the answer
10 depends both on the type of contract and the particular
11 user's privilege involved.

12 The provision of UCITA that poses the most
13 serious preemption issue is, of course, the mass market
14 licensing provision contained in UCITA Section 209.
15 Indeed, the mass market licensing provision raises
16 three distinct federal preemption issues, and I'll talk
17 about each one.

18 First, whether all or certain classes of these
19 licenses create rights equivalent to federal copyright
20 and subject matter protectable by federal copyright
21 law, in which case they would be preempted under the
22 express statutory preemption test contained in Section
23 301 of the Copyright Act itself. This is so-called
24 statutory preemption.

25 Number two, whether the use of mass market

1 licenses to contractually extinguish various users'
2 privileges contained in the federal Copyright Act
3 would, in effect, set at naught the paramount policies
4 of federal copyright law and would thus be preempted
5 under the supremacy clause itself. This is so-called
6 implied preemption of state law as articulated by the
7 United States Supreme Court in the Sears Compco cases
8 and their progeny.

9 And third, and most intriguing from this
10 panel's perspective, whether mass market licenses made
11 enforceable under UCITA, even though the terms are
12 disclosed only after the consumer has paid for the
13 information product, constitute unfair or deceptive
14 acts or practices within the meaning of the Federal
15 Trade Commission Act and would thus be subject to
16 federal administrative preemption by the Federal Trade
17 Commission.

18 While the first preemption issue, express
19 statutory preemption, is exclusively for the courts to
20 decide, the third is obviously well within the
21 jurisdiction of the Federal Trade Commission, and
22 certain aspects of the second issue may also be
23 appropriate for Federal Trade Commission consideration.

24 I will briefly address each of these preemption
25 issues in turn and in the process respond to the last

1 two questions that the panel has been asked to address.

2 First, express statutory preemption. With
3 respect to express statutory preemption, proponents of
4 UCITA generally cite the proCD versus Zeidenburg case,
5 which held that federal copyright law does not preempt
6 enforcement of shrinkwrap licenses that prohibited a
7 purchaser from making commercial use of a product that
8 he then proceeded to make commercial use of. The Court
9 reasoned that, "A copyright is a right against the
10 world. Contracts, by contrast, generally affect only
11 their parties. Strangers may do as they please. So,
12 contracts do not create exclusive rights."

13 And by way of illustration, the Court noted
14 that someone who found a copy of ProCD's information
15 product on the street would not be affected by the
16 shrinkwrap license. Well, now, I confess, I scoured
17 the streets on my way home and coming down here this
18 morning to see if I could find any free software and
19 was unsuccessful.

20 But even conceding the point, suppose that the
21 shrinkwrap license in ProCD had instead been a
22 clickwrap license embedded in the sequence of the
23 startup of the database itself, requiring the user to
24 agree to the license terms in order to get access to
25 the software or database. By ProCD's own logic, such a

1 license would seem to be a contract to which there
2 could be no strangers, a contract creating the
3 functional equivalent of rights against the world. And
4 under 301, it would seem those contracts would be
5 preempted.

6 I don't raise that illustration to suggest they
7 ought to be preempted but simply to illustrate that the
8 express statutory preemption test of 301 is a rather
9 blunt instrument to try to deal with the nuanced
10 question that we face, and indeed its whole purpose was
11 simply to preempt common law copyright and not deal
12 with the problem that we're confronting.

13 Thus, even if mass market licenses are not
14 preempted under the express statutory preemption test
15 contained in 301 of the Copyright Act, they might
16 nevertheless be preempted under the implied preemption
17 test if they are deemed to set at naught, to undermine,
18 some paramount policy of federal copyright or, I might
19 add, competition law.

20 This brings me to the fourth and fifth
21 questions that the panel has been asked to address;
22 namely, whether the first sale doctrine should apply to
23 software and whether a licensor should have the ability
24 to restrict reverse engineering or limit the fair use
25 of software.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 The short answer to the fourth question is that
2 under the express terms of Section 109 of the Copyright
3 Act, the first sale doctrine does apply to software but
4 only where a user of the software is the owner of the
5 particular copy being used. And for those who don't
6 revel in such matters as the first sale doctrine, I
7 suppose I should tell you what the first sale doctrine
8 is.

9 Section 109 of the Copyright Act says that the
10 owner of a particular copy of a copyrighted work is
11 entitled, without the authority of the copyright owner,
12 to sell or otherwise dispose of the possession of that
13 copy. So, if you go to your friendly neighborhood
14 mega-bookstore and buy a book, you can sell it or give
15 it away, even though you don't have any copyrights in
16 the book, you just own the particular copy of the work.

17 Section 109, by limiting the first sale
18 doctrine to owners of a particular copy, permits the
19 first sale doctrine to be contractually abrogated by
20 the simple expedient of the copyright owner deciding to
21 lease or rent copies of the copyrighted work rather
22 than sell. So, in this respect, I would say 109
23 specifically permits contractual abrogation of the
24 first sale doctrine.

25 But suppose in a mass market transaction, which

1 to all outward appearances is a sale, a mass market
2 license nevertheless states that the consumer is not
3 actually the owner of the copy that the consumer has
4 paid for and perhaps has even paid a sales tax on, but
5 only apparently a perpetual lessee who may not sell or
6 otherwise dispose of the copy without permission of the
7 copyright owner.

8 Can a mass market license by Fiat transform the
9 character of the transaction? I would suggest that
10 whether one is an owner or not is not a matter of the
11 contract; it's a matter of federal copyright law as to
12 whether one is an owner and therefore entitled to
13 dispose of a copy of a copyrighted work.

14 Is it a matter of indifference to federal
15 copyright and competition policy that UCITA will, in
16 effect, extinguish an entire category of transactions
17 in the mass market for computer programs and other
18 digital information? Is federal copyright law
19 unaffected when public libraries across the country
20 discover that they cannot be said to own a particular
21 copy of a digital work that they may wish to add to
22 their collection?

23 Even if federal copyright or competition law
24 does not preempt this mass extinction of an entire
25 species of transactions on the mass market, it bears

1 pointing out by way of answering the fifth question the
2 panel has been asked to address, that unlike the first
3 sale doctrine recognized in Section 109 of the
4 Copyright Act, the fair use privilege recognized in
5 Section 107 of the Act is not limited to owners of a
6 particular copy of a copyrighted work but extends
7 apparently to any user of the work.

8 Indeed, as amended by Congress in 1992, the
9 only amendment that has been made to the fair use
10 privilege, Congress amended the fair use privilege to
11 explicitly point out that it extends to unpublished as
12 well as published works. The legislative history of
13 this 1992 amendment is particularly instructive with
14 respect to the question we are faced with, as the House
15 Report on the amendment cites with approval the case of
16 *Wright v. Warner Books, Incorporated*, a Second Circuit
17 case, which held that a contractual term purporting to
18 prohibit the publication of unpublished library
19 archived manuscripts "in whole or in part, unless the
20 publication is specifically authorized by the archive,
21 should not be construed in such a way as to prohibit a
22 biographer from using the manuscript for scholarly
23 purposes, as," in the words of the Court, "it defies
24 common sense to construe this agreement as giving
25 scholars access to manuscripts with the one hand but

1 then prohibiting them from using the manuscripts in any
2 meaningful way on the other."

3 The Wright case itself, quoted with approval
4 from the trial court opinion in Salinger vs. Random
5 House, Incorporated, which stated that, "To read
6 restrictions agreed upon as a condition for obtaining
7 access to the unpublished manuscripts in a library
8 archive as absolutely forbidding any quotation, no
9 matter how limited or appropriate, would severely
10 inhibit lawful scholarly use and place an arbitrary
11 power in the hands of copyright owners going far beyond
12 the protection provided by law. Thus, both cases
13 refused to enforce terms in an access contract that
14 purport to bar the fair use of an unpublished work."

15 As my time is short, I will leave it to other
16 panelists to address more fully the question whether a
17 software licensor should have the ability to restrict
18 reverse engineering or otherwise restrict fair use of
19 software, and federal courts have held that certain
20 reverse engineering of software is a fair use, and
21 rather, I will conclude my remarks by posing the third
22 preemption issue raised by UCITA's mass market
23 licensing provision; namely, whether mass market
24 licenses made enforceable under UCITA, even though the
25 terms are disclosed only after the consumer has paid

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 for the software, constitute an unfair or deceptive act
2 or practice within the meaning of the Federal Trade
3 Commission Act and can thus be preempted by the FTC as
4 a matter of federal administrative law.

5 In her written submission to the FTC, Professor
6 Jean Braucher has already presented cogent arguments
7 for precisely that proposition. I would simply add
8 that from the perspective of the law of unfair
9 competition, mass market licensing terms made
10 enforceable under UCITA, even though the terms are
11 disclosed only after the consumer has paid for the
12 software or other digital information, arguably
13 constitute the worst possible form of bait and switch.

14 Not only must consumers incur the onerous
15 search costs, for which UCITA's right of return
16 provision really does little to offset, to discover the
17 true nature of the transaction being proffered, but
18 unlike most victims of bait and switch that at least
19 are notified before the sale of what is being switched,
20 consumers victimized by post-transaction disclosure of
21 mass market terms will learn of the true nature of the
22 transaction only after they've entered into it. This
23 isn't just bait and switch; this is plain old passing
24 off.

25 I would conclude by noting that while the FTC

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 may not exercise authority over states as sovereigns
2 unless that authority is unambiguously granted to it by
3 statute, the FTC has been held to have authority to
4 preempt contractual terms conflicting with its
5 enforcement efforts under the FTC Act itself. I would
6 thus urge the FTC to exercise that authority by
7 adopting rules prohibiting as an unfair and deceptive
8 practice the delayed disclosure of mass market
9 licensing terms, at least where it's possible to
10 present the terms prior to the transaction.

11 Further, I would urge the FTC to carefully
12 consider what impact UCITA's capacity to extinguish an
13 entire species of transactions in the mass market for
14 information products and to restrict forms of reverse
15 engineering of computer software that have been
16 judicially determined to constitute a fair use, what
17 impact these effects will have on consumers and the
18 competitive process and to take such preemptive federal
19 action as it deems necessary to protect both.

20 Thank you.

21 MS. MAJOR: Thank you, Professor McManis.
22 Professor Reichman?

23 MR. REICHMAN: Well, thank you for inviting me
24 to speak to this important forum.

25 I'm not going to discuss the issue of whether

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 intellectual property law adequately protects computer
2 information and how software should be treated. My
3 general position is that all forms of subpatentable
4 innovation today, including biotech, today meaning the
5 post-industrial age, are essentially inadequately
6 protected. What has happened is not that our patent
7 and copyright laws have broken down, but our trade
8 secret law has broken down, so you don't get enough
9 natural lead time, anyone can copy anything, and this
10 gives special interest the opportunity to want to
11 multiply exclusive property rights, when what we need
12 is a new type of liability regime that would follow
13 some artificial lead time and encourage follow-on
14 innovations by requiring payment for use of small-scale
15 innovation.

16 I have recently developed this theme in I think
17 a pretty cogent argument, a new paper of "Green Tulips
18 and Legal Kudzu; Repackaging Rights in Subpatentable
19 Innovation." This will appear in the November issue of
20 the Vanderbilt Law Review Symposium on Law and
21 Economics of Intellectual Property Rights. You can
22 have an advanced copy by writing me. I have one or two
23 copies here.

24 I will instead speak about UCITA, and I will
25 first discuss its underlying philosophy and then

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 explain how that philosophy adversely affects
2 intellectual property rights and what maybe we can and
3 cannot do about it. Forgive me, I will certainly call
4 it "Ucita" at some point. I grew up in Italy, and it
5 is spelled like "ucita." "Ucita" means exit, and
6 because I think we should exit as fast as possible, I'm
7 easily confused.

8 Another reason for talking about the philosophy
9 of it is that I have an article on this topic called
10 "Privately Legislated Intellectual Property Rights,"
11 reconciling a feeling of contract with public good uses
12 of information, with my co-author, a very promising
13 young scholar, Jonathan Franklin, in the University of
14 Pennsylvania Law Review last year, and the philosophy
15 part is drawn from the third part of our article. It's
16 a very long article, and because nobody ever gets to
17 the third part, I thought I would take the opportunity
18 to develop it. You are welcome to have some copies of
19 this, take these if you're interested.

20 The worst thing in my mind from a philosophical
21 point of view about UCITA is that it pretends to derive
22 from Article 2 of the Uniform Commercial Code, which
23 was a profound revolution in modern contracts law aimed
24 at giving effect to the real intentions of the parties.
25 I teach Article 2. I consider it a scientific

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 revolution of dramatic proportions, the most refined,
2 assent-driven paradigm ever formulated and the most
3 refined set of default rules ever formulated.
4 UCITA instead, by jointly mimicking some of the
5 language some of the time and then changing the
6 variables, UCITA is instead a quintessential --
7 addresses a quintessentially post-modern problem, the
8 nonassent-driven mass market contract. It gives us
9 adhesion contracts valid against the world and defended
10 by technological fences that cannot be decrypted and
11 reinforced by underlying intellectual property rights
12 that convert effectual monopolies into legal monopolies
13 that will last forever and that will not recognize
14 public interest exceptions.
15 It has nothing to do with mutual assent, as
16 does Article 2 of the UCC. It is about contracts
17 imposed by fear, without mutual consent, and under
18 contracts that have the potential to severely restrain
19 trade and free competition. It is not a set of default
20 rules in the sense that we talk about default rules in
21 the academy in the theoretical sense. A set of default
22 rules arise when the parties negotiate or are conceived
23 of negotiating in a set of zero transaction costs to a
24 set of rules that both sides could live with.
25 Article 2 of the UCC is a perfect set of

1 default rules. It is what buyers and sellers are
2 presumed to negotiate to a negotiated middle ground in
3 the absence of transaction costs.

4 In contrast, UCITA deals with a dictated
5 adhesion contract, a one-way standard form contract
6 that embodies sellers' ideal list of clauses and
7 minimize buyers' interests. It is a buyers' and
8 consumers' nightmare. How this came about and how the
9 drafting committee was captured by special interest
10 that only looked in one direction I can't take the time
11 to tell you, and if you don't know it by now, it's
12 probably too late.

13 Article 2 of the UCC was a magnificent move
14 away from tort law to the perfection of individual
15 autonomy in contracts law. UCITA, instead, is a
16 massive move away from contracts based on individual
17 autonomy, and therefore, it necessarily takes us back
18 towards tort law, because only government can regulate
19 the public interest nationwide under nationwide
20 adhesion contracts, especially adhesion contracts that
21 impinge on intellectual property rights and affect
22 access to the building blocks of knowledge.

23 Now, having said that and having identified the
24 need for regulation, let me be the first to say, and we
25 say it in this article, that regulation has to proceed

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 with a great deal of caution, because over-drastic
2 regulation or premature regulation could interfere with
3 this fast pace of innovation and appropriate
4 investment.

5 Let me first examine the impact of UCITA on
6 IPRs for a moment, and then let's think about some of
7 the things we can do about it. What UCITA does, to
8 understand it philosophically, it restores the power of
9 the two-party deal that was lost when Guttenberg
10 invented the printing press. As soon as the printing
11 press is invented, you can no longer tie up people by
12 contract. Anybody who gets a copy can make other
13 copies.

14 So, because the publishers needed help from the
15 state, they re-arrived at a very wonderful set of
16 default rules known as copyright law; however, because
17 the state was needed to provide a portable fence in the
18 area of the Guttenberg, these default rules are
19 balanced. They balance public and private interests,
20 and this balance of public and private interests that's
21 evolved over a hundred years and matured over a hundred
22 years is in my view responsible for the success of
23 innovation under the Industrial Revolution and for the
24 successful beginning of the information revolution.

25 However, the new information technologies now

1 make it possible to reimpose two-party deals on the
2 rest of the world. You put it in a contract, you put
3 your stuff online, you surround it by nonencryptable
4 stuff which the law will prohibit anybody from
5 encrypting and then you have a click-on license at the
6 gateway.

7 So, the classic adhesion contract can do all of
8 the things that you couldn't do in intellectual
9 property. You can prohibit the reverse engineering of
10 trade secrets by lawful means. You can override fair
11 use in copyright law. You can prohibit scientific and
12 educational uses of noncopyrightable databases that
13 were customary or traditional. If you think about it,
14 all hard problems today in the scientific community are
15 addressed by the -- the first act is to accumulate and
16 assemble a massive, complex database from existing
17 sources. You can do that because data, raw data, is
18 not protected in copyright law.

19 You can override this by contract under UCITA.
20 You can thus exclude access to information that has
21 always been in the public domain and even information
22 that was, in effect, generated at public expense. You
23 can dictate the modes of research.

24 In recent testimony before the National Academy
25 of Sciences, we were confronted by a foreign database

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 in biotech where having granted a license and having
2 allowed American scientists to use the database, it
3 imposes methods of research that are totally different
4 from what our biotech community can use, even though
5 you've paid for access to this database. So, you're
6 creating barriers to entry, you're creating barriers to
7 innovation, barriers to scientific and intellectual
8 progress and barriers to the kind of follow-on
9 innovation that gives us our Silicon Valleys.

10 We are told that these are private agreements
11 and that government should keep out. The truth is,
12 these are not agreements. There is no mutual assent in
13 the way the term is used in Article 2. They are
14 privately legislated intellectual property rights.

15 Nevertheless, they depend on the public power.
16 That's why we're here. If state legislatures and the
17 state police powers don't enforce them, they will not
18 get enforced, and this is a reason why they must bow to
19 the higher needs of the state to protect the public
20 interest.

21 Now, once we say that, once we recognize that
22 from a contracts angle, we are moving back towards tort
23 law here, from an intellectual property angle, we are
24 also creating opportunities for private entrepreneurs
25 to override the public interest and displace the public

1 domain that has been the basis and the foundation for
2 all future innovation up to now, as well as for free
3 competition.

4 This new nonassent-driven paradigm of contracts
5 and intellectual property law requires strong and
6 direct government regulation, but here again, I sound a
7 note of caution. How to regulate it is very difficult,
8 because if we go too far in the opposite direction, we
9 will then restrain honest and legitimate innovation.

10 So, how can we approach this problem? In our
11 article, we think the logical point of departure is to
12 think about the concept of misuse or abuse, both of
13 intellectual property rights and of these
14 quasi-intellectual property rights that we're talking
15 about. Our problem is that we only know what worked in
16 the past. We know that fair use has worked. We know
17 what kinds of public interest exceptions have worked in
18 the past, but we're not sure how the past applies to
19 the future in information technology.

20 We know that reverse engineering of trade
21 secrets by lawful means is pro-competitive, we know
22 that fair use is pro-scientific and pro-educational and
23 pro-competitive, and we know that maintaining access to
24 noncopyrightable data in the public domain is the basis
25 of all our inputs into the knowledge information

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 economy, but we must also not undermine genuine
2 expressions of freedom of contract, and we must not
3 disrupt investment in innovation.

4 So, our solution proceeds from our -- one of
5 our proposed solutions proceeds from basically three
6 concepts. If you think about it, Professor Llewellyn's
7 assent-driven paradigm of contract formation in Article
8 2 is founded on the notion of a negotiated middle
9 ground, a negotiated middle ground to which buyers and
10 sellers would reach, and then in your individual
11 transactions. So, we proposed the concept of the
12 non-negotiated middle ground for these type of adhesion
13 contracts, standard form contracts, because whether we
14 like standard form contracts or not, whether we get
15 UCITA or something better, we're going to have to learn
16 to live with the standard form contracts in the
17 information age.

18 So, we are going to have to find a way that
19 will regulate them without impeding innovation and
20 without destroying it on the other side. So, we
21 proposed a non-negotiated middle ground as the standard
22 from which we can evaluate reasonable terms and
23 conditions that would be automatically validated.

24 The second concept, however, is the doctrine of
25 abuse that sits astride intellectual property law,

1 contract law and licensing law. We propose a robust
2 doctrine of abuse or misuse that would allow courts
3 directly to invalidate nonstandard solutions imposed
4 under standard form contracts that have the effect of
5 unduly impinging upon the federal intellectual property
6 system or the public interest in access to information.

7 And the third concept which implements this
8 concept is a specific contracts doctrine, over and
9 above preemption, over and above the public policy
10 exception, but a specific doctrine to implement this
11 standard of abuse. For lack of a better name, we have
12 called it public interest unconscienability. Another
13 way to think about it is a Sword of Damocles clause.
14 What do I mean by a Sword of Damocles clause? It
15 means that as long as you do the right thing and don't
16 try by standard form contracts to deviate, impinge,
17 distort the customary practices under intellectual
18 property law, your contract should be valid from the
19 point of view at least of intellectual property.

20 If instead you start to impose standard form
21 contracts that override fair use, that distort the
22 ability to reverse engineer in general, you will have a
23 problem. You'll have to justify that.

24 Let me give you some language and then give you
25 an example. The language is up there, but it didn't

1 come out so well. The general Sword of Damocles --
2 thank you -- the general Sword of Damocles clause that
3 we propose would be item number one, all mass market
4 contracts, non-negotiable access contracts and
5 contracts imposing non-negotiable restrictions on uses
6 of computerized information goods must be made on fair
7 and reasonable terms and conditions with due regard for
8 the public interest in education, science, research,
9 technological innovation, freedom of speech and the
10 preservation of competition.

11 Now, that sounds like an attack, but, in fact,
12 it would validate 90 percent of all contracts, because
13 if you did not interfere with any of those things, then
14 you have a clean bill of health and you don't have to
15 worry about anything, and even if you do do some of
16 those things but you do it in an affirmatively
17 negotiated way, the second clause gives you a
18 presumption of validity.

19 Example: If you're dealing with another firm
20 in delicate negotiations investing a lot of money in
21 software, you may have very good reason to prevent the
22 firm that you're licensing your software to from
23 reverse engineering your innovation. There's nothing
24 wrong with that. You should affirmatively get that
25 clause up there, and that would be validated by our

1 second clause.

2 On the other hand, if you start putting clauses
3 that prohibit reverse engineering of computer programs
4 by the whole world, then that would trigger clause
5 three. Whenever non-negotiable terms are challenged on
6 any of the grounds set out in 1, the party proposing
7 the form or the record in question bears the burden of
8 establishing that the private benefits accruing
9 outweigh the public harm.

10 Let me just shoot ahead here and remind you
11 that -- put it this way: Over time, we think that this
12 would actually become quite simple to implement. We
13 would -- we call it the basket approach. We would
14 develop three baskets to facilitate transactions of
15 this kind. You would have a red basket of clearly
16 invalid mass market provisions. You would soon get a
17 green basket of clearly valid provisions. And you
18 would have a yellow basket of borderline clauses which
19 would depend on the facts, if you use these borderline
20 provisions, you have to be prepared to hear them
21 challenged.

22 Let me just conclude with some long-term
23 implications -- let me also note that actually our
24 proposal was taken to the ALI by Harvey Pearlman, and
25 in effect it was voted up by the ALI 90 to 60, but the

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 drafters didn't buy it, and Harvey tried to negotiate
2 with them. It was a losing negotiation, and what you
3 get is the paled 105 that we don't really think does
4 the job.

5 The long-term implications of this are really
6 very great. One of the biggest fallacies underlying
7 this and other initiatives is to ignore the dual nature
8 of data and information in the information economy. On
9 the one hand, data are inputs into the information
10 economy, the raw material. Then, later on, data become
11 bundled into products, information products, sold on
12 the market which logically attract intellectual
13 property rights, patents, copyrights and so on.

14 What we're doing is collapsing the two, and by
15 one means or another, in this forum or other forums,
16 certain interests are trying to get exclusive property
17 rights, legal monopolies, in the upstream flow of data
18 where they would normally enter the public domain.

19 If we allow this, we will vulcanize the public
20 domain. We will make it as difficult to get access to
21 the inputs, the basic building blocks of knowledge, as
22 it once was, to send goods down the Rhine River or
23 goods from Milan to Genoa with 150 gatekeepers' hands
24 out there demanding a toll, and if we do that, we could
25 kill our national system of innovation.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Our wonderful hegemonic national system of
2 innovation is not the product of some salon. It grew
3 out of a series of circumstances, led by the cold war,
4 but its basic genial features is that we spend a lot of
5 taxpayers' money to gin up a lot of data and
6 information which flushes through the system, everyone
7 can use it, no one can make it exclusive, until you
8 bundle it into a downstream product. If we block that,
9 if we make it impossibly difficult to get to upstream
10 data for competitive or educational or scientific
11 purposes, I do believe that some archaeologist or
12 philosopher in the future will look back and say, gee,
13 they really had it going, and it was this tinkering
14 with this goose that lays the golden eggs of innovation
15 that killed the whole thing. So, I think we have to be
16 very careful. A lot is at stake.

17 Thank you.

18 (Applause.)

19 MS. MAJOR: Thank you, Professor Reichman.

20 Go ahead, Mr. Brennan.

21 MR. BRENNAN: While we are trying to get this
22 to work, I'm proud to say I've made my first online
23 agreement with the FTC. I said this diskette I had to
24 translate at the hotel, so it may have a virus, I give
25 no warranty. They said, don't worry about it, if you

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 put it in our computer, you may get a virus yourself.
2 I'm proud to say it didn't work for either one of us,
3 so let's see if I can get the machine to work.

4 We are going to see right now whether or not --
5 we got it sort of to work. Oh, okay, I -- it worked.
6 Okay, so our first deal was a success, whew, that's
7 great.

8 Okay, so I have to -- I am here to talk a
9 little bit about the benefits of copyright. I am an
10 attorney, but I am also probably the only one here who
11 is actually a software developer. I try to make my
12 living writing code. I wish I could tell you I was a
13 rich software developer, but I don't think that that's
14 going to happen soon. Good news for me in the stock
15 market, though, I don't have to worry about that IPO.

16 So, I am going to talk a little bit about why
17 we need to reconcile copyright and commerce. We have a
18 burgeoning economy in information products, and we need
19 to bring copyright and commerce together, and to do
20 that I want to talk about three things, the fundamental
21 principal of copyright, sounds important; how first
22 sale really works; and then what UCITA is trying to do
23 on this matter.

24 So, let me talk with the fundamental principal
25 of copyright. I lost the mike? Scream louder.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Okay, and that's it, simple concept, a copy is
2 not a copyright. When you acquire a software package,
3 two events happen; the copy and the right to use the
4 copy, and they're separate, and Congress said this
5 specifically in the Copyright Act in Section 202, as a
6 matter of preemptive federal law, preempting all state
7 law, ownership of a copy is different from ownership of
8 a copyright.

9 And if I can give you a little silly example
10 here that kind of illustrates the difficulties, I had a
11 colleague of mine who said the producer walked into his
12 office one day, and he said, I own all of the Isaac
13 Asimov books. I own them all. We have got to make
14 these into movies. They said, that's great, let's go
15 make a movie about I Robot, it would be terrific.

16 The next day the producer came in and said we
17 ran a copyright report, and you don't own any of the
18 rights. He said no, I went to the bookstore and I
19 bought the books. He bought the books; he didn't buy
20 the rights. It's a silly example, but it illustrates
21 our point.

22 Okay, I thought it was 15 minutes. Ah, I see.
23 Oh, okay. I get it now, I get it now, this was the
24 undisclosed term, right?

25 MS. MAJOR: There you go.

1 MR. BRENNAN: All right, I have it right now.
2 Wait a second, I have the media action. I'm safe at
3 last.

4 Okay, and Congress, of course, said that this
5 is a fundamental principle of the Copyright Act, we
6 know that, and the result is simple. If you don't have
7 a -- if we don't have a license, we don't have any
8 rights in the copyright, and the reason for this is
9 what they call the freerider problem. You see, unlike
10 physical goods, when I remanufacture a toaster, it's
11 the same cost to remanufacture that toaster, but the
12 cost of copying works goes down dramatically. So, I as
13 a software proprietor need to control copying so that I
14 can earn the royalties that I need to live on so I can
15 make more work. So, that's the whole purpose of
16 copyright, to give creators the money to make new
17 works.

18 Voltaire said this exactly. He said God has
19 given us the power to create, but nature has contrived
20 it that in order to do so, we must eat, three times a
21 day, and that's why copyright owners need royalties.
22 It's kind of basic here, I wish this was like really
23 exotic law stuff, but it's pretty obvious.

24 Let's talk about the first sale doctrine,
25 because we have asked about that, and the rule is very

1 simple. When you get a copy, a copyright law gives you
2 certain privileges to use that copy without an
3 infringement. There's a lot of them in the Copyright
4 Act, but let's look at the first sale doctrine. It's
5 pretty straightforward.

6 It basically says the owner of a copy can
7 resell it, okay? Not difficult. But there are certain
8 exceptions here. It only applies to the authorized
9 owner of a copy, okay? You have to own it. It only
10 affects the distribution right. You don't have a right
11 to make new copies. You don't have a right to publicly
12 perform it. The owner is not required to make a first
13 sale, we heard that already, and there is a rental
14 right for software independent of first sale that
15 Congress has given to software proprietors, and this is
16 all fairly obvious.

17 Let me give you a simple example. If I sell
18 you my car, you can loan it to your teenaged son to
19 joyride all you want, it doesn't matter, but if I loan
20 you my car, I don't think I gave you the right to let
21 your teenage son joyride in it. You know what I mean?
22 That's the point.

23 And, of course, we see this all the time. Here
24 is my American Express Goldcard. I don't own this,
25 they rent it to me, and this happens all the time in

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 business. We are not too worried about this, it's not
2 a big deal. And that's how the first sale doctrine
3 works.

4 The important point about first sale, however,
5 is this: Remember state law cannot compel a copyright
6 owner to sell its works. That's an exclusive right
7 given to the copyright owner. If they elect to make a
8 sale, then the first sale doctrine says, of course, the
9 user can resell it, but by the same token, the first
10 sale doctrine is insufficient for many, many uses, and
11 here's the difference with software.

12 You see, right now when we take information,
13 we're usually passive recipients, we just read it, but
14 when we go to use software, we want to reutilize it, we
15 want to make new copies, we want to exercise more
16 rights under the copyright, and that's where the issue
17 comes in, and that's why we need to deal with what we
18 did in UCITA.

19 The problem is we have to get the commercial
20 law and the copyright law groups to start talking to
21 each other, and unfortunately it seems like poor UCITA
22 is in the center, and we get hit from both sides, but
23 without trying to put the discussion together. If we
24 take a commercial law view only about what happens in
25 the mass market, we say, well, use the Article 2 sale

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 of goods paradigm, but there's a problem with that, and
2 it's very simple.

3 It only deals with the copying, and we've
4 already seen that federal law says we have to deal with
5 the copyright, as well. That's an intangible. And the
6 terms in Article 2 don't apply to intangibles.

7 We have heard a lot about the preemption issue
8 right here, but if we're going to be intellectually
9 rigorous, we have to take all the preemption analysis
10 we've heard and apply those provisions to the default
11 rules in Article 2 and ask ourselves, are the default
12 rules in Article 2 consistent with the default rules in
13 the Copyright Act?

14 I've taken the liberty of doing that. I've
15 just submitted here and I'll publish next month in
16 Duquesne an article in which I take all of the default
17 rules in Article 2, compare them with all the default
18 rules in the current Copyright Act, and we get to the
19 conclusion that Article 2 is not compatible. It
20 doesn't work.

21 If Article 2 doesn't work and we have our
22 preemption arguments that we've heard before, what law
23 does apply to transactions in the mass market? We're
24 left with the old general law of contract. And what
25 does that mean? The last shot rule. Every court,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 every court has said when that shrinkwrap license
2 arrived with the goods, that is the counteroffer by the
3 supplier that is a last shot, and when you utilize the
4 software, you have accepted the shrinkwrap on all of
5 its terms. Every court says that. The Stepsaver case
6 says that, and they all agree that those are
7 enforceable, okay? We're talking about contract law.

8 The other thing we can do is take a
9 copyright-only view, and then we say certain things
10 like, well, all mass market licenses should be
11 enforceable -- unenforceable, but we have problems with
12 that, because if there is no license, we risk making
13 consumers infringers. Let me show you an example.

14 Here we have a shrinkwrap book. Yes, it's
15 shrinkwrap. This is the license, right here. This is
16 the most popular book now on Java programming. I don't
17 know if any of you bother to read books on Java
18 programming, I have to, but this was originally
19 published on the net electronically. It was so popular
20 that he made it available in a hard cover version, and
21 when I go into the store at Borders yesterday and
22 bought this, two transactions happened.

23 Transaction number one, Borders sold me a copy,
24 but transaction number two was I had a license with
25 Bruce Eckel to do more than just read the book. I

1 wasn't the passive consumer of information. I was
2 reading this book, and I wanted to take the code
3 samples in the book and copy them into my software, but
4 that's a copyright infringement unless the license
5 authorizes me to do it.

6 And since that's a deal between me and Bruce
7 Echols, and if we read the license he says, you can do
8 that, but since I, Bruce Echols, am in the business of
9 doing education, you can't use my book and my code
10 samples for education without giving attribution to me,
11 and that's what we're talking about here. If we blow
12 off this license, then all of the computer books in the
13 business right now who authorize you to make copies are
14 copyright infringers.

15 Not only that, but if I took this Java
16 programming, took his code, made a Java uplink, you
17 download it on your web page, you have made an
18 unauthorized copy, too, and there is no good faith
19 purchaser defense to copyright infringement. We risk
20 making massive people infringers if we say these
21 licenses are unenforceable. So, we can't do that. We
22 have to figure out a way to deal with it.

23 The second thing is, sometimes we say, okay,
24 well, mass market licenses are enforceable only if
25 they're negotiated. Well, that brings us this problem:

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 Here's this. I have 2000 programs on this. They're
2 web retailer programs. They allow me to take these and
3 utilize them. There's no way I could read or would
4 want to read 2000 licenses before I bought the
5 diskette.

6 This cost me \$5. I'm a small developer right
7 now. There's no way I can get shelf space in CompUSA
8 unless -- with a big package, I need to put them in
9 here, like thousands of other developers. This is a
10 component source.

11 Software today isn't written by starting from
12 scratch. You take preexisting components, you put them
13 together like you assemble a prefab house, and you turn
14 the switches off and on. There are a thousand programs
15 on here. If we say that you have to read the license
16 on each one of these, all of these small developers and
17 innovators don't have a way to get their products to
18 the marketplace.

19 So, if we want to support innovation, we have
20 to have a way to deal with this that prevents them from
21 being copyright infringers, and this is what UCITA
22 tried to do.

23 We don't want to impose the commercial friction
24 of forcing consumers to read licenses to buy a \$5
25 product. It doesn't make any sense. But at the same

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 time, we need to empower the innovators to come to the
2 market.

3 So, here's what UCITA said. We want procedural
4 fairness and substantive freedom. In a commercial
5 transaction, if you tell people terms are coming, then
6 you can negotiate in layers with heads of agreements
7 and deal memos. We do this all the time. And in the
8 mass market transaction, you've got to tell what the
9 license terms are at least when you access it. So,
10 when I take these 2000 programs home and I load them
11 one at a time and I see the one I want, a license pops
12 up, and it tells me these are my terms, and if you
13 don't like it, you can turn it off, and if I want to
14 send it back, I suppose I could send it back for the
15 five bucks, but this is a package. This isn't the
16 product. This is like the box that your toaster comes
17 in. It's not the product.

18 Let me talk about a couple things so I don't
19 run out of time here. We talked about transfer rules
20 and UCITA. UCITA says almost nothing about this. This
21 is very simple. A party's contractual interest may be
22 transferred unless it's prohibited under law. What's
23 that all about? Federal law says you cannot transfer a
24 nonexclusive license without permission of the
25 copyright owner. Why? It's exactly what I told you

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 about the car example. I don't necessarily say if I
2 give it to you, your teenage son can drive the car.
3 UCITA doesn't say whether that's true or not, but it
4 says if it is true, then we're going to follow federal
5 law, and then it adopts the rule in current Article 2,
6 that if it materially changes the duty of a party, you
7 can't transfer it. This is not particularly exciting
8 or revolutionary.

9 Let's talk a little bit about fair use. Fair
10 use, UCITA expressly refers to preemptive federal law.
11 So, if federal law says you can't contract around fair
12 use, UCITA agrees. Now, I happen to disagree on
13 whether or not you can contract around fair use. I
14 think you can, and I want to give you examples where we
15 do it.

16 I have a customer list. I say that's my
17 proprietary list, you won't disclose it. No problem,
18 that's called trade secret law. We do that all the
19 time. I give you my private consumer data, and I say,
20 you can only use my data for a particular purpose. We
21 don't disagree with that. That's privacy law right
22 now.

23 So, in all of these ideas, I would say in
24 Wright vs. Warner Books, that's a great case, I would
25 cite it for the same reason, because the Court said the

1 contract is enforceable, but we don't interpret it as
2 prohibiting fair use. My answer is fine. If federal
3 law actually preempts the rule, UCITA doesn't disagree.
4 It says fine, you can preempt. But if it doesn't
5 preempt, UCITA is not going to force the states to
6 adopt a rule at the state level that the feds haven't
7 done, because remember we said copyright law is a
8 balance. So, we can't change balance at the state
9 level that Congress has left open, and if we disagree
10 or promise to change it, and that's all UCITA says.

11 What about the terms that allows a court not to
12 enforce a term contrary to public policy? No problem,
13 but there is one thing UCITA doesn't do, and that's
14 this, it does not permit courts to usurp the
15 legislative job of deciding how to balance public
16 policies, and this is the problem I have with what
17 Professor Reichman proposed. It was discussed
18 extensively, I wrote an extensive law review article
19 about the problems with that proposal, and what it does
20 is it basically says you, courts, are to choose one
21 public policy over another, and we don't give you any
22 standards for doing it.

23 That's not how our system works. We're in a
24 national election now to elect legislators in Congress.
25 They decide how to balance competing public policy.

1 Let me give you an example. There is nothing in that
2 motion about protecting consumer privacy. Does that
3 mean somebody can do science on my private medical
4 records and I have nothing to say? That's a balance
5 that the legislature has to effect.

6 Let's take another example. We talked about
7 contracting around fair use right now, or the balance
8 between fair use and copyrighting, but the Supreme
9 Court has already ruled that the fair use provision
10 totally accomodates that. That was a holding in
11 Harpers & Rowe.

12 So, right now we don't -- we can't draft a
13 state law that says irrespective of what we've said in
14 Harpers & Rowe, state courts under some standard are
15 supposed to undo what copyright law was going to do.
16 That's exactly what UCITA says. We are going to allow
17 courts to apply public policy, but it's the legislative
18 job to balance those policies.

19 I want to finish up talking about something
20 that's really interesting to me -- am I done yet?

21 MS. MAJOR: About one or two minutes, please,
22 thanks.

23 MR. BRENNAN: What interests me and where I
24 work now is this idea of frictionless commerce. What
25 we want to do is try to empower consumers and empower

1 people to make their own contracts. We've never had
2 this chance before, but the net allows feedback, and I
3 wish that this conference would have had a chance to
4 talk about this.

5 For example, the P3P proposal allows consumers
6 to create their own standard form, has a privacy
7 contract, and impose that on the supplier. I would
8 urge people who think that UCITA is -- remember, UCITA
9 specifically allows consumers to do this, to write
10 their own standard forms, and it says if the consumer
11 writes it and then imposes it on the manufacturer, it's
12 enforceable, too.

13 Why doesn't somebody who wants to have consumer
14 protections do what the open source movement did?
15 Write a consumer protection contract, write as many as
16 you want, maybe the FTC will make them all available on
17 their site, and the businesses can then sit down and
18 say -- consumers can say, well, I want to do a deal
19 using this standard form contract, and the businesses
20 can then decide, well, yes, I'll do the deal with you,
21 or no, I won't, or I'll do it on these terms.

22 The second thing is, we're writing electronic
23 agents to do this electronically. IBM just finished
24 their second conference in which all the tech people
25 are writing agents that will bargain for you. We know

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 about these shopping bots that go out on the net and
2 they find you the best prices. Well, the next
3 technology is to allow them to negotiate for you if you
4 want, but that demands using standard form contracts,
5 that demands using automated transactions, and those
6 transactions will empower consumers to deal with other
7 sources.

8 Now, and ultimately, maybe consumers as a group
9 will get together and say, I have 10,000 consumers,
10 this is our form contract for our group, which merchant
11 wants to supply us? Now, there may be antitrust
12 problems there with consumers, I don't know.

13 So, let me -- am I done now?

14 MS. MAJOR: Yes.

15 MR. BRENNAN: Okay.

16 MS. MAJOR: I have a question for you actually.

17 MR. BRENNAN: Well, thank you. My conclusion
18 is, we need to reconcile commerce and copyright. I
19 think UCITA meets that goal.

20 MS. MAJOR: Thank you. Thank you very much.

21 I'm somewhat confused about the analogy you
22 made with the license that was in the Java book and the
23 software licenses that we're seeing. My impression was
24 that that type of license is a license that would
25 actually extend more rights to you as the purchaser of

1 that book, whereas licenses that are given with
2 software are licenses that actually take away
3 intellectual property or copyright protection.

4 MR. BRENNAN: When you say extend and take
5 away, all of these things are a balance in an entire
6 transaction. In some cases, software licenses extend.
7 In some cases, they may restrict, but it's part of the
8 balance.

9 I have a -- our group is a software developer,
10 we are a beta test shop for Cybase. We get a license
11 from Cybase for their beta test software that says
12 don't criticize our software. In a sense that has
13 restricted my fair use right, but there's a reason for
14 it. They don't want me to go running and running
15 benchmarks of their software in the press because then
16 you deceive the public by running beta test software
17 against complete software.

18 So, does that restrict my rights? Yes, but it
19 also empowers me to get new beta test software that I
20 wouldn't otherwise see that we can comment on, because
21 that's part of our job.

22 MS. MAJOR: Professor Cohen, did you want to
23 make a comment about that?

24 MS. COHEN: No.

25 MS. MAJOR: Okay.

1 MR. BRENNAN: I'm sorry, I didn't want to take
2 your time. I'm done.

3 MS. MAJOR: Okay, thank you very much.

4 MS. COHEN: I'm in the somewhat awkward
5 position -- actually in two somewhat awkward positions.
6 The first is that I never got the letter with the five
7 questions, so I'm like the Evil Senate and The Satyr
8 who doesn't even know what the questions are, let alone
9 what they mean, and the second is this chair makes me
10 feel like I'm about two feet tall. So, I will peer
11 over the table and try to say what I was going to say
12 before I knew what the five questions were.

13 You've probably all heard the example or the
14 joke about the UCITA car that comes from a big three
15 auto manufacturer or what used to be a big three auto
16 manufacturer before they all merged with the European
17 manufacturers, and it comes with a license, and when
18 you buy the car, you can't criticize the car, and even
19 when you test drive the car, you have to sign a little
20 form that says you can't criticize the car, and there
21 are lots of other terms, you can't install the radio,
22 you have to go to an authorized service shop, you can't
23 really install any equipment other than what came from
24 the original manufacturer.

25 Or think about a UCITA lamp, comes with a

1 little contract that says you can only use it eight
2 hours a day, you can't use unapproved light bulbs, and
3 you can't use it to throw light for more than one
4 person at a time, and if we can tell that you're doing
5 that, because we have a little sensor in it, and if we
6 see there's more than one person there, that's a use
7 inconsistent with the terms in the contract, so we can
8 just disable the lamp.

9 These are things that are funny, people are
10 chuckling, except these are things that UCITA allows
11 for software, particularly 209 of the mass market
12 license section, section 605, the automatic regulation
13 of performance section, section 816, the electronic
14 self-help section. These are things that you see that
15 allows for software, and in the context of software,
16 these are not just funny ha-ha, how could anybody ever
17 do this to consumers. These are intellectual property
18 issues.

19 Let's think first about reverse engineering of
20 software, say you want to, you know, reverse engineer
21 the UCITA car to make some equipment that would go with
22 it. Click-up contracts, obviously we have heard
23 already today, can and usually do bar a person from
24 reverse engineering lawfully acquired the software.
25 Now, this runs contrary -- we have also heard to the

1 general rule that you can reverse engineer a lawfully
2 acquired unpatented product, it's fair use under
3 copyright law, because copyright doesn't allow the use
4 of copyright law to protect uncopyrightable ideas and
5 functional principles unless the person has a patent on
6 them.

7 And trade secret law also allows the reverse
8 engineering of publicly available products. To do that
9 is considered misappropriation of trade secret unless
10 there's a contract, mutually negotiated contract. So,
11 the wholesale distribution of mass market licenses that
12 prohibit reverse engineering and then result in
13 treating a mass marketed product as a trade secret
14 subject to a mutually negotiated contract.

15 Now, some might say that this does not invert
16 the normal ruling of intellectual property law. The
17 Supreme Court has said in a case called *Tiwan Oil vs.*
18 *Biochem*, trade secrecy law is not preempted, and that
19 reasoning was based on two assumptions. First, that
20 that trade secret law is interstitial, is a gap- filler
21 that will not be the preferred form of protection; and
22 secondly, that when people invent something good, they
23 will try to get patent protection for if they can. And
24 you might also toss in a third assumption, the ordinary
25 rule that copyright can't be used to protect ideas for

1 functional principles.

2 In fact, if every mass marketed software
3 subject to a license that bans reverse engineering,
4 these assumptions and the world view that they reflect
5 is inverted, so that trade secrecy law comes to
6 predominate every copy of a software program that is
7 now subject to trade secret law, even though it's mass
8 marketed, and this -- this radically subverts the
9 premises that the court was relying on, which was that
10 all else being equal, the premises of disclosure and
11 freedom to reverse engineer that are at the core of the
12 federal intellectual property system will prevail, will
13 predominate, will be the form of protection that most
14 people choose.

15 And this is not a question as to which it's the
16 legislature's job to balance. On the one hand, the
17 benefit you might get from disclosure under the federal
18 system and on the other hand the advantages that you
19 get from trade secret. There's a balancing, but it's
20 not the legislature's job. The policies are
21 constitutional.

22 The Supreme Court has held that the
23 intellectual property clause in the Constitution
24 requires that you can't remove information from the
25 public domain, you can't use copyright law to do it,

1 you can't use patent law to do it by giving patent
2 protection to nonobvious, subpatentable inventions, and
3 that's what happens here when you have a mass market
4 regime that extends trade secrecy law everywhere by
5 barring reverse engineering. You have de facto patent
6 protection. It's not the job of any legislature
7 constitutionally to implement such a regime.

8 And once you have a regime like that in place,
9 Jerry Reichman has written persuasively how it
10 frustrates technological process and competition, it's
11 worth thinking about some other things that can be
12 frustrated. If you can prohibit reverse engineering
13 and prohibit perhaps any criticism that someone might
14 wish to make once they reverse engineer the product and
15 discover there are problems with it, you can subvert
16 not only the ordinary process of competition and the
17 ordinary process by which consumers seek to find out
18 which products are best suited to their needs, you can
19 subvert some other things that are fairly important.

20 Think about public standards setting processes.
21 There was a much publicized brouhaha a couple months
22 ago in which the Microsoft Corporation developed an
23 implementation of the Curberose security standard.
24 It's a publicly agreed standard by a publicly
25 accessible standards setting process that is run by

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 members of the computer industry, and Microsoft wrote
2 its own implementation of this standard, and then some
3 folks started to say, gee, this isn't just an
4 implementation of the publicly agreed standard, this MS
5 Curberose makes important changes, and so if you get MS
6 Carberose, then you have to have Microsoft server
7 software, and it's a way of co-opting, if you will,
8 this publicly agreed standard.

9 Gee, Microsoft, we would like to know that you
10 haven't done that. Would you please publish your
11 specifications so we can see whether you've done that
12 or not? So, they did a wonderful thing. It's kind of
13 cute. They put the specification -- Microsoft put the
14 specification on the web, but they wrapped it up in
15 clickwrap, and in order to get through the UCITA
16 specification, you had to agree that everything you
17 would see was Microsoft's proprietary trade secret
18 information, and you couldn't tell people.

19 So, you could go ascertain for yourself maybe
20 whether you thought that Microsoft was adhering to this
21 standard or co-opting or corrupting it, but you
22 couldn't share the information with others in a
23 meaningful way that would enable them to determine
24 whether you could substantiate that or not.

25 And an organization or a bulletin board called

1 Slashdot, which is a haven for Microsoft critics,
2 published or allowed some members to post the
3 specifications in violation of the clickwrap license
4 agreement, and then they refused to take them down, and
5 there was a big dispute, and Slashdot held fast, but if
6 Slashdot had been intimidated into taking down these
7 posts or if everybody had felt constrained by the
8 license agreements in the first place, then all of a
9 sudden you have a world in which yes, you can
10 criticize, but you can't substantiate your criticism by
11 sharing any of the facts that would allow people to
12 make a reasoned evaluation for themselves as to whether
13 you're full of hot air or not, and it's quite easy to
14 set at naught these very important industry practices
15 for setting technical protocols and standards, and I
16 think this would be a bad thing for consumers, and I've
17 gone on record as saying that.

18 Let's take another example. Let's think now
19 about privacy and let's think about the UCITA lamp that
20 reports to the manufacturer whether you've been using
21 it to light up the desk for more than one person at a
22 time or whether you've been using it for more than
23 eight hours a day. UCITA allows a regime like this to
24 be put in place, and Section 605 of UCITA allows a
25 so-called electronic regulation on performance.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 It says it's just to prevent breach and not to
2 repossess, but that distinction is rather meaningless,
3 because what Section 605 lets you do is back up an
4 express contract term, first of all, with functionality
5 that will disable the software, and it also allows you
6 to incorporate functionality that will prevent you from
7 being inconsistent with the agreement. Sounds kind of
8 like a repossession to me. Maybe you don't lose
9 complete use of the software, but you step over the
10 line, and it's disabled. And you can also use
11 electronic regulation or performance to prevent use
12 after termination of a stated term or event in the
13 contract.

14 Now, let's contrast this, again, with the way
15 intellectual property law works. As Lorin Brennan told
16 you, copyright law protects the work, not the chattel
17 embodied in the work, but what he got wrong is that
18 copyright doesn't give a right to control how you use
19 your copy. In fact, copyright law is riddled with
20 exceptions that give users of work substantial autonomy
21 over how they use their copies, and they're there, if
22 you will, as default terms in presenting a public
23 policy judgment that copyrights should not control how
24 you use your copy.

25 Copyrights should not interfere, among other

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 things, with strong property and privacy traditions
2 that allow people to exercise control over chattels in
3 their possession, and if you go back again to the
4 origins of the intellectual property clause and the
5 early history of copyright, copyright was not remotely
6 associated with use. Copyright was a right to publish,
7 a right to publish copies and sell them commercially,
8 and that's all it was at English law, and that's all it
9 was at first under United States law. Copyright
10 doesn't let you protect use; patent law lets you
11 protect use. Patent law lets you prohibit other people
12 from using your invention, but if you haven't qualified
13 for patent protection, then that's not a right that
14 federal intellectual property law gives you.

15 Now, if we replace that default regime, which I
16 might add also is substantially privacy protective,
17 with Section 605, we can regulate performance, and
18 implicitly the notion that some information can be
19 collected that will allow you to regulate performance.
20 This substantially constrains the freedom to use
21 chattels in your possession, substantially invades
22 privacy to the extent that the information is
23 collected, substantially threatens individuals' control
24 over intellectual property that they create themselves
25 if access to it can subsequently be disabled, maybe

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 substantially threatens business consumers' trade
2 secrets if information about how to use the software
3 would reveal some sort of trade secret about how that
4 business itself does business, how that business itself
5 operates, and flies in the face, of course, of other
6 intellectual properties that you've already heard
7 about, such as the fair use doctrine, such as the idea
8 expression, distinction and the notion that one cannot
9 use copyright to protect or prevent use of
10 uncopyrightable public domain building blocks and
11 prevents resale under the first sale doctrine and,
12 indeed, expressly allows the licensor to guard first
13 sale, prevents you maybe from making a backup copy of
14 software.

15 Instead, Section 614 in UCITA puts the risk of
16 loss of a copy on the licensee, not the licensor. You
17 can just go down the list of copyright default rules
18 that allow latitude to use one's copy as one sees fit
19 and find -- and check them all off, that UCITA would
20 allow them all to be vitiated.

21 Now, here again, this isn't a place where it's
22 the legislature's job to set this balance. A lot of
23 these exceptions go back to the historical and
24 constitutional roots of United States copyright law,
25 and we can't so cavalierly say that it's simply a job

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 for the legislature. The courts have a role, and the
2 legislature is constrained. It cannot make the full
3 range of decisions that otherwise might be open to it.

4 A final -- how am I doing, by the way?

5 MS. MAJOR: Fine. One more minute?

6 MS. COHEN: Okay.

7 Let me say something also about libraries.

8 Some of these restrictions that have been spoken about,
9 clickwrap restrictions, can prevent libraries from
10 exercising rights that Section 108 of the Copyright Act
11 gives them to make copies for patrons or to make
12 archival copies, and to the extent that fair use would
13 authorize other library copying, clickwrap provisions
14 and automatic enforcement of performance can prevent
15 that, as well.

16 Similarly, if access to a work expires or is
17 withdrawn, Section 605 says the licensor can
18 automatically disable access to the work, and then, oh
19 dear, I'm like in a world where at least you have
20 access once you terminate your subscription to back
21 issues of journals for which you've already paid, you
22 lose it all. You lose even the back issues that were
23 covered while your subscription was valid, as well as
24 any new information that you've decided you no longer
25 want to pay for, and fine, maybe you shouldn't have

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 access to that, but that hardly justifies taking away
2 the whole ball of wax.

3 And it bears noting here, also, that some of
4 these resources include things like government
5 documents that are in the public domain, information
6 that has been purchased for public libraries and public
7 university libraries with public money, access now
8 completely yanked away, and that this -- even if you
9 don't go all the the way back to the historical and
10 constitutional bases of copyright law, certainly
11 frustrates some of the important public policy
12 functions that libraries serve.

13 So, can the fundamental public policy language
14 somehow make all this go away and restore all of these
15 copyright default rules back to where they started? I
16 somehow doubt that's what the drafters of UCITA
17 intended. Otherwise, why bother? So, one more
18 concretely fundamental public policy is a term of art
19 that's been around in contract case law for over 200
20 years, that you can go back and find 150-year-old cases
21 in which one term or another was invalidated and
22 violative of the fundamental public policy, and what
23 you learn if you go look at those cases is that there's
24 a long tradition of having that exception and
25 construing it incredibly narrowly.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 So, I leave that up to you to decide whether
2 you think that would get us back to copyright default
3 rules, but I can't say I leave it up to you to decide
4 whether the states can just wholesale abandon all these
5 copyright default rules, because the Constitution does
6 not permit that sort of regime.

7 MS. MAJOR: Thank you very much, Professor
8 Cohen.

9 We have a few questions from the audience, but
10 since we have only a couple of minutes, I will defer to
11 these questions and go to my own. This is directed to
12 Mr. Brennan.

13 If a disk contains 200 license terms that you
14 aren't in a position to read, doesn't Professor
15 Reichman's idea of standard default license terms make
16 sense?

17 MR. BRENNAN: No, because if they're all from
18 different vendors under different sources, everybody
19 has their own business models, some of these things
20 here are right now provided on a shareware basis.
21 Share it, use it, if you don't like it, send it back,
22 please pay me. Others are provided on a license term
23 up front. Pay your license terms now before you can
24 use it. Others are provided on a 30-day test notice.
25 Default terms means that every business must adopt the

1 same model, and that's not valuable for these
2 businesses.

3 MS. MAJOR: Professor Reichman?

4 MR. REICHMAN: No, absolutely not. It's
5 amazing to me as Lorin spoke how much we agreed on and
6 then how much he leaps away to the exact opposite
7 conclusion. We agree that in individual cases you can
8 contract around failures. We agree that you can
9 contract around the prohibition on reverse engineering,
10 and you should. You have two ways to do it. You can
11 either negotiate it up front, as he does with his
12 privacy rules, or you develop a standard form contract
13 that respects the federal intellectual property
14 balance, and you won't have any trouble.

15 When he says that the legislature has to speak,
16 the legislature has spoken. The legislature has given
17 us all these copyright default rules. The role of the
18 court is to evaluate the conflict between the way you
19 are applying your private interests and the way the
20 federal disposition and policies exist.

21 Now, if there's a conflict, first of all, the
22 judges will say there's a conflict, and this contract
23 is invalid, so don't use this type of rule. Now, what
24 will happen? Not only will we have the baskets that we
25 had before, but the people who are dissatisfied will go

1 to the legislatures, and they will say, we don't think
2 this is a good -- that this should be in the green
3 basket, not the red basket, and slowly the legislatures
4 will decide which rules are good and which are bad, and
5 we will develop an information policy based on actual
6 cases and not speculation and not jumping to the
7 conclusion to give one side the right to dictate the
8 terms.

9 MS. MAJOR: I'm going to ask one more question
10 even though I realize it's time for a break, if anybody
11 wishes to get up and excuse themselves, please feel
12 free to do so, but I think this topic is important
13 enough to go into our break time.

14 One more question directed to Mr. Brennan. How
15 can anyone shop online and compare, as you say, when
16 you need to purchase prior to seeing the terms?

17 MR. BRENNAN: Well, the first thing is, we keep
18 talking about this purchase prior to seeing the terms,
19 and the problem is we're having the wrong image in our
20 minds. We think right now that you are buying software
21 when you buy this disk. You're not. You're buying a
22 copy. Bruce Echols says in his book, when you buy the
23 book, there's a separate relationship between you and
24 I, because the copy is separate from the copyright.

25 So, when you say that you are shopping and

1 purchasing online, you've got to remember, in these
2 transactions, there are two components, and this is
3 required by federal law. When you go and you shop
4 online and compare terms right now, you can look at the
5 software, see whether or not there's a license there,
6 and examine its terms. One of the things that we're
7 doing now with shopping bots is to create electronic
8 agents that not only bargain on the price but that
9 bargain on the terms.

10 IBM has created a new program called Common
11 Rules. It is a list of how you disclose offers and
12 acceptances and the terms of contracts that electronic
13 agents can see and understand and bargain for, and I
14 think that's where the technology is going.

15 MS. MAJOR: Are we though, in fact, even buying
16 a copy, as you just said? You know, we're not buying.
17 You used the word "buying." We're licensing, aren't
18 we?

19 MR. BRENNAN: Fine, let me answer this. You
20 have now put your foot on the third rail. Do you buy a
21 copy of software online? Professor Reichman will want
22 to add that he and I spent a month in Geneva debating
23 this issue. If you are transmitting a copy online,
24 then the intra -- and the telephone company and the ISP
25 is also transferring a copy, as well, and in the sales

1 law, that means that they are liable for interim
2 contracts, which means they're liable for default
3 warranties and default rules. The ISPs in the Geneva
4 conference and the DMCA went nuts over this, and the
5 compromise was at least in the international area was
6 you are not selling a copy, you are making it
7 available.

8 I won't categorize what I think that is in U.S.
9 law. I think the copyright practitioners treated these
10 that they are making available a public performance
11 right. UCITA deliberately does not step on the third
12 rail. We don't take a position, the statute doesn't,
13 on whether or not there is a sale of a copy online.
14 So, all I can say is that is a major issue that I think
15 somebody has to address before you just assume that you
16 are purchasing software online.

17 MS. MAJOR: Professor Cohen?

18 MS. COHEN: I think it's a little irresponsible
19 to imply that if we can't have UCITA, we won't have
20 shopping bots and P3P and all these other lovely
21 things. They are really two entirely separate
22 questions. Are we going to have some set of default
23 contractual rules that govern these type of
24 transactions and are we going to have this particular
25 set that we're here arguing about?

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 It is entirely possible to say, and I think
2 that Professors Reichman and McManis have also been
3 saying, that it's certainly feasible to have a set of
4 contractual rules that govern transactions in software
5 and information. It doesn't have to be this set. And
6 it's also worth noting that consumers may want to use
7 shop bots and P3P and other lovely things and that
8 consumers will presumably be licensing that technology
9 or be entering into contracts based on that technology,
10 and wouldn't it kind of be a drag if you couldn't find
11 out some basic things about how this technology that's
12 automatically spending your money online is working? I
13 think that's pretty basic information that consumers
14 need to know.

15 MR. BRENNAN: Can I --

16 MS. MAJOR: Sure, you may respond.

17 MR. BRENNAN: Just one thing on that, we talk
18 about that we should explain all the software, one of
19 the issues that comes up right now is we have the love
20 bug virus precisely because Microsoft makes all of
21 their products interoperable, so you can get in and see
22 how they work, and one of the things we have to balance
23 is when we talk about opening up the software, there is
24 a need for encryption technologies, as well.

25 MS. MAJOR: Go ahead.

1 MR. REICHMAN: I just have a question, small
2 question, I didn't have time to write it down for
3 Lorin, I remember your car analogy.

4 My question was, if I lend you my car for 100
5 or 1000 years, have I also sold it to you or not, and
6 if not, what's the difference?

7 MR. BRENNAN: You know, I don't want to talk
8 about Article 2. I'm not an expert on 2. What you're
9 asking me is a different question. If your question is
10 whether or not a transfer of ownership in perpetuity
11 constitutes a sale, the federal circuit already
12 addresses that in the DSC case, and they said that the
13 fact that you transfer a copy in perpetuity is not
14 necessarily an indication of a sale. You might recall
15 that Ray Nimmer was on the opposite side of that and
16 lost that argument. What constitutes an indicia of a
17 sale? There's a whole volume on that, and I'm not an
18 expert on 2-A, Article 2-A.

19 MR. McMANIS: Lorin, you're getting caught in
20 your own attempt to clarify. If I transfer to you in
21 perpetuity a copy of a copyrighted work, that is a sale
22 of the copy, though it is not a transfer of the
23 copyright.

24 MR. BRENNAN: Sure, sure, but I think I just
25 said that. Whether or not a transfer of a copy in

1 perpetuity is a sale, you have to look at the
2 difference in 2-A. I don't know. I do know that DSC
3 said that that was alone not enough to make a sale.
4 What else does? You'll have to look at the individual
5 circumstances.

6 MS. MAJOR: On that note of perpetuity, we will
7 take a five-minute break and reconvene.

8 (A brief recess was taken.)

9 MR. SALSBURG: Okay, we are going to get
10 started.

11 For this final panel of the FTC's High-tech
12 Warranty Products and Services Public Forum, we are
13 stepping away from the law. As you undoubtedly have
14 noticed over the the past day and almost two days now,
15 almost everybody that you heard from has been a lawyer.

16 Well, we figured that we should end the public
17 forum on another note, and --

18 UNIDENTIFIED SPEAKER: Except one.

19 MR. SALSBURG: -- and let's step back now and
20 realize that everything that we've talked about in the
21 last day and a half may be stale a couple hours from
22 now, and to figure out if that is the case, we have
23 asked two preeminent computer scientists to come join
24 us today, and what we have asked them to do is to put
25 on their thinking caps, something that we lawyers may

1 not be able to do at times, but to put on their
2 thinking caps and come up with some technological
3 solutions to some of the problems that we've been
4 discussing here.

5 The two computer scientists are, first of all,
6 on my right, Dr. Shirley Becker. Dr. Becker is a
7 professor of computer science and software engineering
8 at the Florida Institute of Technology where she is the
9 co-director of FIT's Software Engineering Research
10 Center, and her research includes web usability and
11 testing, web enabling technologies and database
12 systems, and we're thrilled to have her here.

13 The second computer scientist here is Dr. Ben
14 Shneiderman of the University of Maryland's Department
15 of Computer Science. He is the founding director of
16 the University of Maryland's Human-Computer Interaction
17 Laboratory, and his pioneering work on hypertext user
18 interfaces contributed to the formation of the
19 worldwide web, and I know we have heard that about
20 somebody else, but with Dr. Shneiderman, we know it's
21 true.

22 So, with that, Dr. Shneiderman, why don't you
23 take it away.

24 MR. SHNEIDERMAN: Thank you. Thank you to Dan
25 Salsburg, April Major and the FTC for giving me to

1 opportunity to speak here and thank you all for staying
2 the course here late in the day in the second day.

3 My two apologies are that I couldn't join you
4 until later this morning, and I've enjoyed these
5 sessions and the lively conversation and the congenial
6 atmosphere in spite of a highly contentious issue.

7 I guess in that light it's important to repeat
8 that I am not a lawyer and that -- but I'm learning as
9 fast as I can, and the invitation to join today --
10 hello -- there we go, okay -- and just to give you a
11 perspective about where I come from is as a professor
12 of computer science and for 17 years leading this
13 interdisciplinary group of computer science and
14 psychology mainly in trying to study in a more rigorous
15 and scientific way how people use computers, and the
16 group in recent years has been combined with
17 information studies and education as other units.

18 The basic pitch here is to make a scientific
19 approach to get past the arguments, my system is more
20 user friendly than yours, and to study specific classes
21 of users for specific tasks and make a theory-driven
22 hypothesis and testing approach to it so that we might
23 measure the time it takes for a specific user to
24 accomplish a specific task.

25 For example, reading a license online in a

1 small dialogue box, just to choose an example, and then
2 monitoring their retention over time as affected by the
3 design barrier.

4 We have also -- I didn't want to -- let me
5 clarify that these are, you know, performance-based
6 measures on human subjects, and in addition, we do have
7 preference and subjective satisfaction, we've developed
8 a standardized questionnaire for user interface
9 satisfaction that's been licensed to more than a
10 hundred users around the world, and so we do try to
11 understand both the subjective preferences as well as
12 the objective performance on a variety of tasks.

13 Also, understanding the range of individual
14 differences, how much would an experienced lawyer, you
15 know, how long would it take for an experienced lawyer
16 to read a contract as opposed to a novice user without
17 the legal skills? So, those would be distinctions that
18 we would, you know, be interested in finding out about.

19 The whole story is in this kind of book, and
20 again, my credentials are the third edition of this
21 book, so this field has been emerging, first it was in
22 '86, by now this is '98, and so it lays out the
23 territory of this emerging new discipline of
24 human-computer interaction, as it's often called in
25 academic circles, and its practitioner's point of view,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 often called usability engineering, which is emerging
2 as a separate discipline. Independent professional
3 societies have emerged in each of these areas, and
4 possibly about a dozen journals that cover these topics
5 on the academic side and on the professional side, as
6 well.

7 In addition to our own book, there's lots of
8 web resources that have materials, there's hcib.org,
9 has more than 20,000 articles, full text abstracts, so
10 there's a substantial literature in this area. In
11 fact, in order to respond to the question of Daniel
12 Salsburg and April Major, which was to look
13 specifically at the question about the difficulty users
14 might have in reading on the screen in a small text box
15 scrolling window, I have brought you a little bit of a
16 bibliography for you about readability on screens that
17 may be useful for you.

18 And I think the basic issue is not going to be
19 surprise and shock you, but that larger boxes do reduce
20 the cognitively disruptive scrolling and reorientation.
21 It's a result that's been found in many different
22 circumstances, although not to my knowledge has anyone
23 studied the reading of legal licenses, but here, this
24 was a quickly available result from a student project
25 in my class, which is on the web of this class, as

1 well, and you can read it out there, that if you have a
2 large window for this task, it took nine seconds, on
3 average, and standard deviations are shown there, as
4 well. With a medium-sized window, it dropped to eight
5 seconds and -- I'm sorry, the time dropped to eight
6 seconds, and with a large window, the time dropped
7 further to six seconds. There are accuracy results,
8 and I could go on at length.

9 There are other papers that I brought along
10 that, you know, basically confirm those kinds of
11 results, that the size of the fonts are a factor.
12 Small fonts are harder to read. Contrast matters, as
13 well, and so often these license boxes will be small,
14 black fonts against a gray or, worse, a dark gray
15 background, which further degrades the reading.

16 Now, you know, in a legal point of view, does
17 that prohibit reading? No, it only slows down and
18 disrupts the reading by 20, 30, 40 percent, let's say,
19 and so it might make it more difficult for someone to
20 go through a document. And certainly the small screen
21 size and the constant interruption of having to scroll
22 disrupts the cognitive processes of understanding the
23 content and reviewing and returning to earlier passages
24 to understand definitions.

25 So, the narrow question that you've asked me, I

1 do want to bring support, and the simple technological
2 aspect to that would be to, you know, provide larger
3 windows and make it easier to study the document. But
4 I wouldn't say that would be a remedy for the problems
5 that you're addressing here, and so I will broaden the
6 circle to say, you know, more familiar terminology and
7 simplified phrasing would enable more users to
8 understand the content.

9 Now, you know, here is a printed document of a
10 software product, and, you know, in black bold letters
11 it says, "If you do not have a valid license for da da
12 da da da, you are not authorized, double negatives, to
13 install a copy or otherwise use these components," and
14 it goes on in, you know, fairly complex language and
15 technical terms to describe that.

16 Others, you know, that I printed from websites,
17 and I will cover the name of the company, but, you
18 know, it just goes on page after page, proprietary
19 rights, fees, terminations, high-risk activities, et
20 cetera, and it's just not clear to me that most users
21 of mass market software with capacity to comprehend the
22 implications of it, and so although I'm not familiar
23 with the legal doctrines, it's not clear that they're
24 entering in a proper agreement if they can't understand
25 the terms of those agreements.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 So, simplified phrasing, better terms, would
2 enable more users to understand the content, and, you
3 know, another kind of technological fix would be a
4 requirement of a usability test of the contract. What
5 number of a typical sample of readers have understood
6 the terms in this contract? And a sample might be
7 taken, as is done for the normal software, and then you
8 would have some sort of assessment, and you might want
9 to set a standard that's -- and report that 19 of 20
10 typical users were able to read this contract and
11 answer basic questions about it.

12 The capacity to copy, print and send the
13 licenses to others would enable consideration and
14 consultation. That would also open it up and make it a
15 lot easier for people to assess these. Some of the
16 contracts are only readable in that document window at
17 the time of opening, and I asked several people, and
18 maybe I should ask those with laptops here, can they
19 find the license for the software they're currently
20 using? I don't -- we did after some effort, but if you
21 look in common software, you'll find it difficult, if
22 not impossible, to find the license agreement that goes
23 with it. So, that might be another area, again, of
24 making accessibility more possible.

25 Did I see a hand?

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 UNIDENTIFIED SPEAKER: It took an amendment to
2 ensure that it's available after you click.

3 MR. SHNEIDERMAN: Okay, so available and in
4 ways that would be customary with other documents that
5 people could copy them, print them, review them, share
6 them with others, ask for legal advice from others and
7 join in the discussion of those.

8 So, again, I'm focusing here on the narrow
9 response to what you're saying, and these would be, I
10 think, things that would be helpful. But if I broaden
11 it out, I am standing here before you because I think
12 we can do a great deal more to improve the quality of
13 mass market software, and I bang on tables and say it's
14 time to get angry about the quality of software and
15 that I think efforts to improve the quality of software
16 would reduce the tension in this very, you know, this
17 contentious area, the lively battle over this license
18 issue to me is symptomatic not only of the legal issues
19 but that the fact that so many people are so
20 frustrated, confused, anxious and troubled in the use
21 of their software.

22 One survey of 6000 users reported that on
23 average 5.1 hours per week were wasted in trying to
24 figure out their software. That's more time than is
25 spent on the highways and, you know, in traffic, and

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 that makes it a national priority and a concern for
2 every one of us, because as we talk about innovation
3 and increased productivity, we might suggest, also,
4 that we are restricting the creativity of people and
5 their efforts and their productivity because the
6 quality of the software leaves them, again, confused
7 and frustrated and anxious about using the software,
8 that they underutilize features that are available.

9 And so, my primary argument to you is to
10 improve the quality of software and that might reduce
11 some of the conflicts that appear here. I was quite
12 sympathetic to some of the earlier suggestions of
13 having gradations of conflict resolution, and that
14 would also help sort things out.

15 The second is increasing access to customer
16 support might create more sympathetic environment. The
17 studies show 200 million calls to customer support
18 lines and average wait time to get beyond acceptable so
19 that most users don't even bother to call, and so we
20 have an environment in which the consumers feel further
21 frustrated, therefore further angry at the supplier,
22 and I think the suppliers would be the greatest
23 beneficiaries of improvements to the quality and
24 improvements to the service.

25 Then, more provocative things, more accurate

1 reporting on user experiences might clear the air and
2 speed improvement. Now, maybe things are better than I
3 suggest, and I would love to have the data. I have
4 inquired, pushed and prodded manufacturers and other
5 sources, but I have not been able to collect the
6 information about the rate of failures, the struggles
7 that people have and the problems that appear. We just
8 don't know how bad it is.

9 Now, in other disciplines, like airlines, we
10 expect public reporting of the -- you know, the airline
11 delays and the frequency of delays. We'd like to have
12 the same kind of reporting for software. Which
13 software tools are doing great? Which ones are not so
14 good? Which parts of those tools are giving the most
15 trouble?

16 And it's been my suggestion, which the
17 journalists like but the manufacturers think is
18 outrageous, which is that every time you get a dialogue
19 box that you don't understand or you're confused,
20 there's a little button that you click, I don't
21 understand, and an e-mail is sent to the manufacturer
22 who then logs that, you know, that point, and you get
23 to know where the problems are.

24 And I suggested that consumers receive a
25 nickel every time they're confused, and possibly --

1 and, you know, towards purchase of new software from
2 the manufacturer. I think it would be great. And
3 every time the software crashes, you get \$1.

4 Now, we expect that from ordinary restaurants,
5 where I had a waiter to spill some soup on my pant's
6 leg, and they offered to pay my dry cleaning bill and
7 gave free desserts to everyone -- to the four of us at
8 the dinner table, and we expect certain rules of help
9 from airlines if we're delayed, and there are
10 compensation strategies, and I think if we have raised
11 that expectation of compensation for frustration, loss
12 of time, in an orderly way that protects the needs of
13 manufacturers, as well, and it could be, again, as a
14 credit towards future software purchases, we would
15 begin to get the data about where the problem is and
16 how much progress is being made to improve it.

17 Now, this is a very courageous thing for
18 manufacturers to do, but I think this would win the
19 public trust and would make the -- and would make the
20 software better.

21 Ultimately, that's what we're after, right?
22 And I think the dual things of making the public's
23 experience superior would also benefit the
24 manufacturers where customers would be more willing to
25 use more of the products, more willing to upgrade more

1 rapidly, because their trust is so shaken and so poor
2 that they're unwilling to go along too quickly with
3 what the manufacturers supply.

4 So, the compensation for failures, again,
5 restricted, limited ones, but clear ones, not ones that
6 damage the company, but that satisfy and respond to the
7 needs of the consumers. They might encourage customer
8 loyalty and decreased litigation.

9 There's a very nice study in marketing of
10 laptops which showed that consumers who had a problem
11 with their laptop which was serviced promptly and
12 correctly were more loyal in their next purchase of
13 those software -- you have seen that study, too, right?
14 And I think we might expect the same kind of attitude
15 and presentation from software vendors.

16 Now, my, you know, circles of interest are
17 growing here, and the more broad thing I want to
18 suggest here is the forgotten users and the people who
19 are so disturbed by what they get that they do not even
20 participate or they can't participate. The usual
21 community is the disabled users, and the Americans with
22 Disabilities Act has done some effort to make that
23 better -- to make a better situation for disabled
24 users, but I suggest that the problem of user
25 frustration and remorse is a very large one and that

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 there are many disaffected, forgotten and nonusers,
2 while the Census Bureau's recent study shows continuing
3 increase in use of the internet and computers. Just
4 last week they reported about the digital divide
5 falling to the net. The recent report shows progress
6 in this country, there is a discouraging disparity
7 between well educated and poorly educated and rich and
8 poor in this country, and so it's my claim that there
9 are three challenges that the developers of software
10 should face boldly in terms of making their so-called
11 every-citizen interfaces, the title of a National
12 Academy of Sciences report, and if we're going to
13 consider the idea of electronic voting and electronic
14 government services, as the State of Maryland is
15 rapidly pushing to do, then I think these issues must
16 be directly addressed.

17 The first is technology variety of supporting a
18 broad range of hardware and software to make it
19 possible for users with -- to allow them an access to
20 support greater diversity in who the users are, and
21 then the tough one of bridging the gaps between what
22 users know and what they need to do.

23 So, a quick slide on each of these themes. The
24 dark side of Moore's Law is that if you're a software
25 developer using the latest machine, most of your users

1 have a machine that's eight or ten times slower than
2 yours, and how do you design for that environment?
3 That if you're sitting on a ten meg bit per second
4 line, how do you design for a 56K or slower delivery?
5 And it is my firm belief that you can produce a good,
6 not identical, but a good and successful experience at
7 slow band widths and slower processor speeds.

8 Similarly, we see the sort of benefits of
9 dealing with a wide range of screen sizes, from -- I
10 visited IBM Yorktown two weeks ago, and there's a 640
11 by 480 watt size display, which, you know, will be the
12 kind of tools many people will use, but certainly palm
13 devices, laptops or larger displays will provide a
14 range, and we should ensure that both on the high end
15 and the low end that the -- we have a sufficient
16 plasticity at this in the interface designs to
17 accommodate the growing range of technology, and as you
18 suggest, things are changing very rapidly. And, also,
19 to have software version accommodation.

20 My sister who's an English professor, received
21 an e-mail from a colleague, and they had the same word
22 processor. She made some changes to the document and
23 e-mailed it back to her colleague, who could not open
24 that file. After a couple of days of their exchanges,
25 my sister sent me the old version, the new version and

1 all the correspondence, two or three days later, after
2 I found out which version, who got what and what was
3 going on, it was clear that although it was made by the
4 same manufacturer and was the same icons on the screen,
5 it was a slightly later version, and the later version
6 saved it in a different file format, the old version
7 could not open it. Nobody got any messages that
8 clarified what was happening, and, so, they were stuck,
9 and the three of us had spent three days and six to
10 eight hours trying to resolve something that shouldn't
11 have happened.

12 And we have lots of these anecdotes or stories
13 of things that shouldn't have happened, and every
14 technology person can provide you a solution, yet we
15 just don't see those being implemented sufficiently
16 widely.

17 The diversity issue is a growing concern as we
18 try to satisfy the demands of crossing the digital
19 divide, of people with low reading skills, of people
20 with low computing skills, and possible poor English
21 skills, with young and old, et cetera. We need to
22 better understand how to serve these diverse
23 communities.

24 And, finally, the great challenge, which is to
25 bridge the gap between what users know and what they

1 need to know. Certainly, an appropriate issue in the
2 understanding legal documents, but in every field, as
3 we were trying to understand managing our retirement
4 accounts with a well-known broker, we could not
5 understand the terminology they were asking to issue a
6 trade, we could not get the information out of their
7 online glossary, and we had to struggle with those
8 kinds of things.

9 So, here I'm asking for further research and
10 development, and to my dismay, there's actually a drop
11 in research on these topics in the last ten years. It
12 was a livelier topic earlier, in -- in the early 1990s,
13 but we've seen less satisfying developments recently.

14 So, I close with this inspirational quote from
15 Thomas Jefferson. "I feel an ardent desire to see
16 knowledge so disseminated through the mass of mankind
17 that it may reach even the extremes of society, beggars
18 and kings."

19 He would have been trying to cross the digital
20 divide, and we have got about seven or eight years to
21 satisfy the 200th anniversary of this quote to try to
22 make him an honest man.

23 So, I invite you to join the conference here in
24 Washington, I have a few copies that I'm organizing
25 chair of, on universal usability and develop these

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 strategies and technologies and come visit us at the
2 University of Maryland to see what we've been doing.
3 Thank you for your time and attention.

4 (Applause.)

5 MR. SALSBURG: Thank you.

6 MR. SHNEIDERMAN: Should I take questions?

7 MR. SALSBURG: Why don't we have Dr. Becker go
8 ahead and do her presentation, and then we will take a
9 few questions.

10 MR. SHNEIDERMAN: Okay.

11 MR. SALSBURG: I'd offer assistance, but I
12 assume your background --

13 MS. BECKER: This is what happens when you
14 don't bring your own machine.

15 Last week I was out at the jet propulsion lab
16 kicking off a project with scientists out there, and
17 though we were in the same room speaking English, we
18 had some difficulty with terminology, and so I feel
19 somewhat the same way here today, and I would like to
20 apologize if I use some terms incorrectly, but hey, I'm
21 a techie, what can I say?

22 So, what I would like to talk to you today
23 about is what we call web usability issues, and we'll
24 take a look at them in association with warranty
25 information. Let me explain a little bit about this

1 talk today.

2 We have an e-commerce concentration at Florida
3 Tech, and I'm the director of our e-commerce research
4 team, and, of course, the students cleverly came up
5 with this title of E3 and we're the Power of E, so we
6 have gone out and done quite a few commercial usability
7 -- web usability assessments for companies. We
8 continue to do that. We also have some large
9 commercial grants to continue our work in web
10 usability.

11 So, with that said, I just wanted to briefly
12 show you this model that we use in the sense that when
13 we look at a website, we evaluate a lot of usability
14 factors, and they range at the top from design layout,
15 navigation, design consistency, all the way down to
16 information content, performance and accessibility, and
17 in 20 minutes, I certainly can't address all of these,
18 but I am going to talk about them from our survey of
19 what's out there on the web.

20 Last but not least, before I go on, I just want
21 to point out that in this model, whenever we do a
22 usability assessment, we take into account the target
23 user, and so you see in the corner there that the user
24 profile is typically considered in the results of this
25 usability assessment, and Dr. Shneiderman also alluded

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 to that fact, that we need to take into account that
2 we're in a global marketplace, as well as we have lots
3 of differences in terms of ages, gender, computer
4 skills and such.

5 Okay, so, let's just jump right in here and
6 talk about some of our informal findings on web
7 usability when it came to looking at warranty
8 information on the web, and we each took a look at
9 these five usability factors. Though I will try to
10 isolate them somewhat in this talk, you will find out
11 very quickly that they are very integrated. So, when I
12 show you one usability factor, for example, design
13 consistency, it also could relate to information
14 content.

15 So, design layout takes into account typically
16 the web objects that you find on a page, and that means
17 that when you go to a web page, that you can find what
18 you're looking for. It's very identifiable, it's easy
19 to find, and we evaluate things such as font size, good
20 use of white space, those kind of things, when we look
21 at the design layout.

22 Design consistency really relates to the look
23 and feel of each page across pages and then across
24 websites. So, when we're talking about warranty data,
25 we would like to take a look at some consistency

1 factors associated with the look and feel of websites.

2 Navigation just relates to going back and forth
3 throughout a website, and we will take a look at an
4 example of that.

5 Information content is a biggie. We want the
6 user to be able to understand what is found on a
7 particular web page, and here's a little trivia for you
8 from creative good.Com, they do quite a few commercial
9 evaluations of e-commerce websites. In the
10 business-to-consumer world, which is primarily what
11 I'll focus on today, users spend typically seconds on a
12 page and minutes on a website and typically the user
13 cannot find what he or she is looking for, they're out
14 of there, and -- he or she is out of there. And I
15 think you know what I've mean, because you've done
16 that. You've gone to a website, looked for your
17 information, or it's unfriendly, whatever, you're not
18 going to stick around, okay? So, we know that's the
19 case, and yet when we look at warranty information,
20 hmm, we certainly haven't taken that into account.

21 And last but not least is accessibility.
22 Typically accessibility relates to not only all of us
23 but it expands into individuals that are visually
24 impaired and such, and though I won't address that
25 today, it is important to know that warranty

1 information should be readily accessible for all
2 individuals using the web.

3 So, with that said I'm just going to start out
4 by pointing out some aspects of what we found, and
5 let's start out with design layout. Now, this might be
6 pretty obvious to you, that when you look at this type
7 of information on the web that we use upper case and
8 italicized text as if that's going to make a difference
9 in our world. It's overused.

10 The other thing that's come up before is the
11 microfont text that those of us that are somewhat
12 visually impaired and even those that aren't can't
13 really read it. So, those are pretty obvious. But
14 more importantly, it gets back to how long we're
15 willing to be on a particular web page, and informal
16 studies have shown that when we go to an e-commerce
17 site, and again relate to your own experience when you
18 go to amazon.Com, there is a lot of textural
19 information that you don't look at. If it's not right
20 there, concise, clear and easy to access, many of us
21 won't read it.

22 Information content. I took out this little
23 one-sentence licensing agreement information, and this
24 gets back again to design layout, that has to be
25 meaningful and readily accessible to the visual. I

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 highlighted some of the words that I thought, when we
2 talk about solutions, I highlighted some of the words
3 that I thought many consumers would not understand, and
4 they would want to perhaps be able to look them up and
5 get information about, well, what the heck does
6 nontransferable mean anyway?

7 Information accessibility. Many of the sites
8 that we visited, it was virtually impossible -- and I
9 say virtually impossible, because we don't hang around
10 a website very long, but it was very difficult to find
11 the information, and so, basically, what we do is we
12 might look for it for a little while, and then we just
13 leave -- or we'll purchase a product and rely on the
14 way we shop physically, and that is to buy the product,
15 bring it home and open it up.

16 It's interesting that we've talked about how
17 this notice is typically in sealed packages, and it
18 occurred to us how easy it would be to put this online
19 so that we would be aware that before we opened the
20 product that we would be bound by the terms.

21 Here's another thing to consider, when we talk
22 about costs associated with online shopping, this
23 hasn't come up from the talks that I've heard, what
24 about the cost of returning the product? So, if you
25 purchase product online and you decide you don't want

1 to live with the licensing agreement terms and you
2 return it, guess what? You're not going to be
3 reimbursed for the postage.

4 So, these sites that I'm showing you are
5 business-to-consumer, that simply means that you all
6 have access to these sites on the web, and so for
7 illustrative purposes, I've picked Egghead.com. I
8 actually picked Egghead because it was one of the few
9 sites that actually showed us warranty information, so
10 we were very impressed.

11 If you take a look over in the column, see we
12 have warranty under more information, so it looks very
13 promising. So, I clicked on warranty, and let's see
14 where we go with it. Here's page 2, and it says on the
15 top, oh, it's a warranty -- it's Egghead.com's
16 warranty, and I need to keep going, I'm going to click
17 here for manufacturer warranty information about this
18 IBM -- I'm sorry, Microsoft product that Egghead's
19 selling. So, I'm going to go ahead and click on that.
20 Oh, my goodness, I'm on page 3, and you don't see
21 Microsoft's -- the product I'm looking at here, because
22 I wanted to show you the top of this page, but
23 basically I can call the manufacturer or I could
24 continue on, and some of these have links, and
25 Microsoft had a link, so I clicked on it. Page 4, here

1 I am at Microsoft's website. Do you see warranty
2 information anywhere? Hmm.

3 So, I continued on, but needless to say, many
4 consumers won't, and after a few more sites, I actually
5 gave up and didn't find the warranty information
6 following this path, though it is available.

7 Design consistency was quite interesting,
8 because websites vary extensively in the availability,
9 the location and the contents of warranty information.
10 Let me just point out quickly that I did go to one
11 website and decided to use their real chat box to ask
12 them if I could obtain Microsoft's warranty
13 information.

14 So, this was a business-to-consumer website
15 that was selling other vendor products, such as
16 Microsoft's millennium products that we saw here, and
17 so I sent off a message, and the first time the chat
18 box crashed, but the person really didn't know what I
19 was talking about. So, the next time I got the real
20 chat box again, keyed it in, said could I get more key
21 information about Microsoft's product, I would like to
22 know about it before I purchase it, and they sent me
23 Microsoft's toll-free number. So, that was the end of
24 that real chat.

25 So, we take a look, for example, at some screen

1 layouts, this one is IBM's, and I just want to point
2 out IBM, too, has a space here for warranty
3 information, if you notice on the bottom. It actually
4 almost provides us information about the manufacturer's
5 warranty, and it's almost too bad, because the design
6 of this table is very clear and easy to read, and if we
7 did have some links, this would be very user friendly.

8 Here we're at Oracle. Now, Oracle is a bit
9 different, in a sense that Oracle is selling Oracle
10 products, and the others that I showed you were selling
11 other vendor's products. Now take a look at this. I
12 wanted to download one of Oracle's database systems, so
13 here I am looking at these license terms, and they are
14 kind of scary, actually, but I have to check all the
15 boxes, but oh, yeah, I can do that, and then I couldn't
16 fit it all on one page, so I'll show you here.

17 By the way, I thought this was an interesting
18 question, what happens when I check all these boxes?
19 Where does that information go? Is anyone storing that
20 information about me? Gee, I don't know.

21 And here's a second page. This is a scrollable
22 box, and one of the team members pointed out that you
23 could go in and edit this box, or so you think. So, I
24 did go in and cut out all the terms that I don't really
25 like. Now, it doesn't go anywhere. It visually shows

1 it cut out. It doesn't change the terms, but it let's
2 me do that, and then I can click "I accept" or "I don't
3 accept," but what terms did we accept? I don't know.

4 That's a lot of jargon, a lot of terminology,
5 that I really would like to look up, and there is
6 nowhere to go. Here I'm back at -- I'm just -- I'm
7 sorry, I can't remember this website, but I just wanted
8 to show you that the design inconsistency, again, here
9 we have components, highlighted headers, and then
10 instead of clicking on buttons, I am clicking on links.

11 So, now I am going to talk about suggested
12 improvements, so I hope you keep in mind that I am a
13 techy, and my research team, we are all techies, and we
14 view the world perhaps simplistically, but we view it
15 through our technology eyes, and that includes
16 redeveloping e-commerce sites in our classes, so that
17 includes database technology as well as all the
18 technology that we see here.

19 So, we were thinking, gee, wouldn't it be nice
20 if since we are database people and we like building
21 databases and, in fact, we do databases as relatively
22 simple tools in technology to use, why not store
23 warranty information in one place?

24 Now, vendors might complain, Egghead or buy.com
25 might complain that if they had to store all that

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 vendor information that it might be a hardship for
2 them, and, in fact, it might be redundant, and it could
3 quickly get out of date. Well, heck, then, let's link
4 to Microsoft and Microsoft could store their warranty
5 information, but the link would go directly to the
6 warranty information, and we could design the website
7 so I come back. I forgot to point out earlier that
8 when I went to Microsoft's website, I left Egghead.com,
9 and I don't think Egghead.com would really like me to
10 leave their website, but I did. So, we could get
11 around that very easily.

12 And the other things that we thought would be
13 very interesting is to have a database of terminology
14 that we could link to so if we did highlight some of
15 those words or if you told the user there was a
16 glossary of terms, then we could go to a centralized
17 database where we could look up some of these terms,
18 and that would simplify some of the wording on these
19 licensing agreements in the sense that we could go look
20 them up.

21 We also thought that we could come up with a
22 set of standardized license types. Now, what I mean by
23 that is, as we went out and looked at various license
24 agreements, as you would expect, they vary in
25 complexity, and we thought that perhaps there could be

1 just templates of types of licenses so that we all as
2 consumers could start to get to know those types in a
3 very general sense.

4 You know, in technology, we have to be mutually
5 beneficial all the time. We have lots of protocols,
6 and we figured out how to do it in communications, in
7 using these web browsers, in almost every aspect of
8 technology, we have come together, and we have
9 standardized HTML and many other things, and in that
10 sense, it becomes very mutually beneficial. So, we're
11 just thinking why we couldn't do that here.

12 So, continuing on, we had considered the food
13 industry not so long ago was in an uproar about
14 simplifying packaging information that was provided on
15 the outside of the food product, and you know what,
16 it's become an implied standard for all of us, and we
17 all use it. It took a while, but we use it.

18 So, would it be difficult? We looked at IBM's
19 table format. Could we provide certain information in
20 an easy and meaningful way to present on a website?
21 And we could always provide a longer version, if
22 necessary. So, if we went that route -- this is really
23 a super long run-on sentence because legally it was
24 important, then we could make that available, too.

25 So, here's just an example from Egghead.com,

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 again, they have provided a minimal amount of licensing
2 agreement information, and so this is just food for
3 thought. Why couldn't we use something like this and
4 just come up with some templates that the consumers
5 would start feeling comfortable reading and using.
6 Well, this is actually -- it continues on.

7 And here I didn't have time -- I couldn't find
8 any little computer icon, but we even thought we could
9 take it a step further and maybe come up with some
10 standardized icons. You know, when we go to your web
11 browser, we all know what the back button means. There
12 is no ambiguity there. So, could we perhaps, because a
13 consumer spends seconds on a particular web page, could
14 we perhaps think of some common icons that would
15 represent, for example, multi-user licenses versus a
16 single user license?

17 Could we come up with some standard headers?
18 Perhaps we could come up with some standard buttons or
19 agreeing or disagreeing with the terms. Navigation I
20 think is pretty obvious, that we need to get that
21 information and make it available with as few a links
22 as possible.

23 And last, but not least, we found this demo
24 site of a company that I thought was pretty innovative,
25 and if you notice in the middle there it says -- maybe

1 I marked it -- no, I didn't. In the middle it says,
2 good-bye -- let see, good-bye to time wasted trying to
3 order and receive licenses via traditional means.
4 Hello sanity. And if you go here, they use icons to
5 represent the companies, and you can go and make an
6 informed buying decisions by linking to the software
7 licensing product information, and when you click on
8 that, guess what? You get information in a meaningful
9 way about each kind of product.

10 Now, I'm only showing you Microsoft here, but
11 if you notice, it gives you information about the
12 license agreement in terms that are pretty
13 understandable, and though I don't show it on the
14 bottom, I ran out of space, notice on the bottom they
15 are showing some options. So, the goal here is to be
16 able to compare products by licensing agreements
17 instead of the traditional way where you compare
18 products first and then maybe you have information
19 available about licensing agreements. So, this is a
20 different search mechanism and a whole different way of
21 viewing buying software products.

22 And last but not least, we felt that though
23 this is beyond the scope of the talk today that we have
24 all become very insensitive to warranty information.
25 In fact, one of my students was telling me that she

1 downloaded Gnapster and then she said, oh, please don't
2 tell the forum about this, but I'll tell you anyway.

3 If you download Gnapster, and this is true of
4 other sites, they will give you the licensing agreement
5 box, and they think by forcing you to scroll all the
6 way down before -- before you click an "okay" that
7 you're going to read it. In fact, if you try to skip
8 scroll all the way down and click "I agree," it tells
9 you you didn't scroll all the way down to the bottom.

10 So, I asked my students in e-commerce class, I
11 said, well, how many of you actually scrolled down and
12 looked at the text? Oh, none of us, we just scrolled
13 down that scroll bar and clicked I agree. So, I am
14 going to end on that note to that. I think we have all
15 got to the point where we just pretty much ignore
16 warranty information when it isn't made available to
17 us.

18 Thank you.

19 (Applause.)

20 MR. SALSBURG: Dr. Becker, if a consumer were
21 to see the warranty information, is there a way to
22 ensure that that information would still be available
23 on the web later when something went wrong, that the
24 link that they looked at hadn't changed?

25 MS. BECKER: You know, we talked about this

1 back and forth about where should this information be
2 stored. Should the -- for example, Egghead.com be
3 responsible for storing information about whether the
4 consumer agreed to the product or -- the terms of the
5 product or not, and we concluded that on the shopping
6 cart page, it's just one little flag field that you
7 would store with that shopping cart page saying, Yes, I
8 ordered this product, and I ordered a quantity of
9 three, and yes, I checked I agree to the licensing
10 agreement information. It's that simple. I mean, it's
11 my technology that's saying -- my technology brain
12 saying it's that simple. And I think that's where you
13 would store that information. You wouldn't go back to
14 the original vendor, such as Microsoft, and require
15 them to store it. It just doesn't make sense to do
16 that.

17 You'd also want to store it on the site selling
18 the product, because if the product is returned, then
19 you would have that information available to you, and
20 as Dr. Shneiderman pointed out, we have an opportunity
21 now to start gathering this historical information
22 about why did individuals return the product. Did they
23 return it because of the licensing agreement? And
24 believe it or not, people do return products because of
25 the licensing agreement, maybe not very often, because

1 not many of us are reading it, but it does happen.

2 MR. SALSBURG: How expensive would it be for a
3 webber to maintain the information about the warranty
4 that any particular consumer would have agreed to?

5 MS. BECKER: From my perspective, it would be
6 just minimal, minimal. The design implications on the
7 front end would be minimal. I mean, we're talking
8 about adding a field and some textural information to
9 be displayed. That cost is minimal. We're talking
10 about altering a very small component of the underlying
11 database, the impact is minimal. Is that specific
12 enough for you?

13 MR. SALSBURG: Sure.

14 Dr. Shneiderman, we had a couple questions come
15 up here that are along the same theme, and what the
16 questions ask essentially is there are people that have
17 claimed that software is inherently buggy and therefore
18 is different than other types of goods, and so warranty
19 -- the cost of a warranty doesn't make as much sense.
20 Is that something you subscribe to?

21 MR. SHNEIDERMAN: I think some software is
22 buggy, and certainly when something is announced as
23 being beta that, you know, then I would expect
24 different levels of expectations, and so we might have
25 that made more explicit in the law, that early versions

1 of new software get one form of protection, but then
2 things that are mass marketed, we have a right to
3 expect a higher level of performance and disclosure
4 about problems and openness about it. So, making a
5 multiple level approach is reasonable.

6 I do not accept the idea that software is
7 inherently buggy. I mean, it's -- software can be
8 complex. There may be some minor problems. There may
9 be a lot of different issues there, but I think, you
10 know, making those issues more public and having a
11 higher quality for the mass market materials should be
12 an expectation that consumers have.

13 MR. SALSBURG: Do most software manufacturers
14 currently disclose known bugs?

15 MR. SHNEIDERMAN: I don't know. I don't know.
16 Most software -- I would say probably not, probably
17 not. You can find fixes for the things that they have
18 identified and patches and replacements and they'll
19 inform things -- inform you about things that are
20 available, but not for the things that they know about
21 but haven't prepared a fix for them.

22 MR. SALSBURG: Well, thank you both for a
23 wonderful presentation.

24 (Applause.)

25 MS. HARRINGTON: Well, we've reached the end or

1 that's what you think, but we actually wanted to keep
2 you here for another few hours. We have phantom
3 panelists in the hall. No, thank you all very, very
4 much for coming, for listening, for thinking, for
5 providing so much material for us to now pour through
6 and digest. This last panel was terrific. I am really
7 delighted that we ended with the tech people, and I'm a
8 lawyer, so I can say that I was listening and I
9 thought, maybe we just need to bypass the law on this
10 entirely and get with some of the people who are
11 working in applications and practical business here to
12 come up with some models and see if we can promote
13 them. At the same time that we are trying to ponder
14 the legal issues and come to the right conclusion.

15 Many of you have asked over the last couple of
16 days of those of us on the FTC staff, well, you know,
17 so what's going to happen next? And the answer to
18 that is, well, I don't know. We are very -- we're
19 being very candid when we say that we asked you all
20 here, we asked you to make submissions so that we can
21 learn, and that is what we are doing.

22 We are studying this vast amount of material
23 that many of you have helped us to accumulate. We will
24 be reviewing this transcript probably synthesizing it
25 for our own purposes. We will continue to be very

1 interested in how the development of different state
2 law models relates to federal warranty law and very
3 interested in how the development of products, mass
4 marketed consumer products in this area raises
5 questions about the adequacy of federal warranty law,
6 and we will be, as we see these issues, certainly
7 coming back to many of you to help us think through
8 whether there is something that the Federal Trade
9 Commission should be doing or not. We really don't
10 know that there is a next other than continued thinking
11 and studying.

12 So, thank you very, very much for coming. I
13 want to also thank April and Dan and Carol, who have
14 done such a wonderful job of putting this framework
15 together for us to study and learn and to all the folks
16 here at the FTC who have helped in many, many ways over
17 the last weeks to get ready and have this seminar. So,
18 thank you very much, thank you for coming, and please
19 call us if we ever can be of any assistance to you.
20 You certainly have been of great assistance to us.

21 Thank you.

22 (Applause.)

23 (Whereupon, at 4:52 p.m., the conference was
24 adjourned.)

25 - - - - -

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 CERTIFICATION OF REPORTER

2

3 DOCKET/FILE NUMBER: P994413

4 CASE TITLE: HIGH-TECH WARRANTY FORUM

5 DATE: OCTOBER 27, 2000

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 11/8/00

13

14

15

16 SUSANNE BERGLING, RMR

17

18 CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025